(14)

No. 93-723-CSY
Status: GRANTED

Title: United States, Petitioner
v.
X-Citement Video, Inc., et al.

Docketed:
November 5, 1993

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Fleishman,Stanley, Showers,H. Robert

9-24-93 ext til 11-6-93, J. O'Connor, CITED.

Entry	Date	Note	Proceedings and Orders
1	Sep 23 1993	G	Application (A93-284) to extend the time to file a petition for a writ of certiorari from October 7, 1993 to November 6, 1993, submitted to Justice O'Connor.
2	Sep 24 1993		Application (A93-284) granted by Justice O'Connor extending the time to file until November 6, 1993.
3	Nov 5 1993	G	Petition for writ of certiorari filed.
4	Dec 6 1993	G	Motion of National Law Center for Children & Families, et al. for leave to file a brief as amici curiae filed.
5	Dec 6 1993	G	Motion of National Family Legal Foundation, et al. for leave to file a brief as amici curiae filed.
6	Dec 15 1993		DISTRIBUTED. January 7, 1994 (Page 28)
7	Jan 3 1994	P	Response requested -- AS. (Due February 3, 1994)
8	Feb 2 1994		Brief of respondents X-Citement Video, Inc., et al. in opposition filed.
9	Feb 9 1994		REDISTRIBUTED. February 25, 1994 (Page 1)
10	Feb 17 1994	X	Reply brief of petitioner United States filed.
11	Feb 28 1994		Motion of National Law Center for Children & Families, et al. for leave to file a brief as amici curiae GRANTED.
12	Feb 28 1994		Motion of National Family Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
13	Feb 28 1994		Petition GRANTED.
			**********
15	Apr 7 1994		Brief amicus curiae of Morality in Media, Inc. filed.
16	Apr 14 1994		Brief amici curiae of National Law Center for Children and Families, et al. filed.
17	Apr 14 1994		Brief amicus curiae of PHE, Inc. filed.
18	Apr 14 1994		Brief of petitioner United States filed.
19	Apr 14 1994		Brief amici curiae of Ohio, et al. filed.
20	Apr 14 1994		Brief amici curiae of American Booksellers Foundation for Free Expression, et al. filed.
21	Apr 14 1994		Brief amicus curiae of National Family Legal Foundation filed.
22	Apr 28 1994		Joint appendix filed.
24	May 10 1994		Order extending time to file brief of respondent on the merits until June 8, 1994.
25	Jun 8 1994		Brief amicus curiae of Law and Linguistics Consortium filed.
26	Jun 8 1994		Brief of respondents X-Citement Video, Inc., et al. filed.
27	Jul 12 1994		CIRCULATED.
28	Jul 14 1994	X	Reply brief of petitioner United States filed.

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No. 93-723-CSY

Entry	Date	Note	Proceedings and Orders
29	Jul 20 1994		SET FOR ARGUMENT WEDNESDAY, OCTOBER 5, 1994. (1ST CASE).
31	Aug 8 1994		Record filed.
		*	Original record proceedings United States District Court for the Central District of California (5 BOXES)
30	Aug 10 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
32	Sep 23 1994	P	Motion of National Law Center for Children and Families, et al. for leave to participate in oral argument as amici curiae and for additional time for oral argument filed.

93-723

No.

Supreme Court, U.S.
FILED
NOV 5 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

67 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that 18 U.S.C. 2252, which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face on the ground that it does not require the government to prove that the defendant knew that the materials at issue show minors engaging in sexually explicit acts.

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UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 982 F.2d 1285. Two opinions of the district court (App., *infra*, 30a-36a, 37a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1992. A rehearing petition was denied on July 9, 1993. App., *infra*, 43a. On September 24, 1993, Justice O'Connor granted the government an extension

of time within which to file a petition for a writ of certiorari to and including November 6, 1993 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions—18 U.S.C. 2251, 2252, and 2256—are reprinted at App., *infra*, 44a-47a.

STATEMENT

After a bench trial in the United States District Court for the Central District of California, respondents were convicted on one count of shipping child pornography, in violation of 18 U.S.C. 2252(a)(1); one count of distributing child pornography, in violation of 18 U.S.C. 2252(a)(2); and one count of conspiring to violate 18 U.S.C. 2252.[1] Respondent Gottesman was sentenced to 12 months' imprisonment on one count. The sentences on the remaining two counts were suspended in favor of three years' probation. Respondent X-Citement Video, Inc., was fined $250,000 on each count, all but $100,000 of which was suspended. The court of appeals reversed, with one judge dissenting in part. App., *infra*, 1a-29a.

1. The evidence at trial showed that in June 1986 Los Angeles Police Officer Steven Takeshita and FBI Special Agent Nellie Magdaloyo, posing as pornography distributors, met with Gottesman at the business premises of X-Citement Video, which Gottesman owned. At

[1] The district court acquitted respondents on one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and six counts of using a common carrier to ship obscene material in interstate commerce, in violation of 18 U.S.C. 1462.

the meeting, Gottesman agreed to ship videotapes showing adults engaging in sexually explicit conduct to the store Takeshita supposedly owned in Hawaii, which Magdaloyo was said to manage. The next month, Takeshita returned to X-Citement Video and spoke with Gottesman, who mentioned that he was keeping some tapes at his residence because of the Traci Lords investigation. Newspaper articles appearing at that time reported that Lords had appeared in pornographic films while she was under age 18. Gov't C.A. Excerpts of Record 18-21, 27-28; GXs 220, 221.

Approximately six months later, Takeshita returned to X-Citement Video to purchase additional videotapes. During that visit, Gottesman offered to sell Takeshita the Traci Lords tapes, which he had on the premises. Gottesman instructed an employee, Steve Orenstein, to show Takeshita the tapes, but Orenstein declined, saying that he knew the tapes were illegal and that he did not want to get arrested. Gottesman then took Takeshita upstairs and showed him 49 tapes featuring Lords, including two that she made when she was 15. When Takeshita asked which films were made when Lords was that age, Orenstein (who by that time had joined Gottesman and Takeshita), pointed out the two films. Gov't C.A. Excerpts of Record 34-40.

In discussing the purchase of the tapes, Gottesman said that he would accept only cash because he did not want to create any record of the transactions. He also declined to ship the tapes to Hawaii, noting that he was currently under federal investigation. Gottesman said that if Takeshita got arrested, Gottesman would not acknowledge where the tapes came from. Gov't C.A. Excerpts of Record 41-43.

When Takeshita arrived at X-Citement Video the next day to pick up the tapes, Gottesman recommended

that Takeshita sell the tapes for $50 each. He cautioned that if a customer were willing to pay more than $50 he was probably a police officer. Gottesman advised Takeshita that it was safe to sell the tapes in Hawaii because, he said, the government does not prosecute sales of child pornography there. Gottesman supplied Takeshita with 50 videotapes featuring Lords before her eighteenth birthday. That transaction was the basis for the charge that respondents distributed child pornography in violation of 18 U.S.C. 2252(a)(2). Gov't C.A. Excerpts of Record 48-52; Def't C.A. Excerpt of Record 31.

When Takeshita returned to X-Citement Video on February 13, 1987, Gottesman informed him that he had 56 additional Traci Lords tapes available for a total price of $1,000. Gottesman refused Takeshita's request to ship the tapes to Hawaii, explaining that because Lords was a minor he would be knowingly shipping child pornography interstate in violation of the law. Approximately two months later, however, Gottesman agreed to ship the tapes to Hawaii. That transaction was the basis for the charge that respondents distributed child pornography in violation of 18 U.S.C. 2252(a)(2). Gov't C.A. Excerpts of Record 54-56, 70; Def't C.A. Excerpt of Record 32.

2. Following the bench trial, the district court found as a fact that respondents "knew that Traci Lords was under age when she made the films [respondents] transported or shipped in interstate commerce." App., *infra*, 39a ¶ 7. The court then found respondents guilty of violating 18 U.S.C. 2252(a), which provides that any person who "(1) knowingly transports or ships * * * any visual depiction * * * involv[ing] the use of a minor engaging in sexually explicit conduct" or "(2) knowingly

receives, or distributes, any visual depiction * * * involv[ing] the use of a minor engaging in sexually explicit conduct," has committed a felony. The court concluded as a matter of law that "the [g]overnment was required to prove and did prove scienter by showing that [respondents] knew that the person depicted in the videotapes was under 18 years of age." App., *infra*, 41a ¶ 2.

After respondents filed a notice of appeal, they requested and obtained a remand to the district court for reconsideration in light of the Ninth Circuit's decision in *United States* v. *Thomas*, 893 F.2d 1066, cert. denied, 498 U.S. 826 (1990), in which the court indicated that Section 2252 does not require the government to prove that the defendant knew the materials he distributed were *child* pornography. Respondents argued in the district court that, as construed in *Thomas*, Section 2252 violates the First Amendment and the Due Process Clause. The district court rejected those claims. App., *infra*, 36a.

3. The court of appeals felt constrained by *Thomas* to hold that Section 2252 does not require "scienter of the minority of the performers," even though it requires proof that the defendant acted "knowingly." App., *infra*, 11a. The court then went on to conclude, in reliance on *Smith* v. *California*, 361 U.S. 147 (1959); *Hamling* v. *United States*, 418 U.S. 87 (1974); and *New York* v. *Ferber*, 458 U.S. 747 (1982), that "the constitutional minimum requirement of scienter for the Act's proscription of transporting or receiving child pornography is knowledge that at least one of the performers is under age 18." App., *infra*, 14a. In light of *Thomas*, the court declined to engraft a scienter requirement onto the statute in order to avoid holding it unconstitutional. *Id.* at

16a. Because Section 2252, as construed in *Thomas*, does not "require knowledge of the minority of the performers as an element of the crime it defines," the court concluded that the statute is "unconstitutional on its face." App., *infra*, 15a, 17a. Accordingly, the court reversed respondents' convictions.[2]

In dissenting in part, Judge Kozinski agreed that the word "knowingly" in Section 2252 "does not apply to the age of the depicted children." App., *infra*, 23a. He concluded, however, that it was the court's duty to read a scienter requirement into the statute to render it constitutional. *Id.* at 27a. He pointed out that "[s]tatutes often fail to specify mental states for each element of the criminal offense, and courts routinely read scienter into a statute even absent constitutional considerations." *Ibid.*

The scienter requirement Judge Kozinski would have read into the statute was one of "recklessness." Judge Kozinski stated that this Court held in *Osborne* v. *Ohio*, 495 U.S. 103 (1990), that "recklessness is a sufficient mental state to support a conviction in a child pornography case," and concluded that "[i]t is inconceivable that, given the choice between no statute at all and a statute that contains a requirement of recklessness, those involved in passing the child pornography statute would have chosen the former rather than the latter." App., *infra*, 23a, 28a. Judge Kozinski would have reversed

[2] Before holding the federal child pornography statute unconstitutional on the ground that it lacks a scienter requirement, the court of appeals rejected respondents' arguments that the statute is unconstitutionally vague and overbroad because (a) "minor" is defined in 18 U.S.C. 2256 as a person under age 18; (b) Section 2256 uses the word "lascivious" instead of "lewd"; and (c) Section 2256 does not define "bestiality" or "sadistic or masochistic abuse." App., *infra*, 8a.

respondents' convictions, however, because he thought that respondents were tried on a strict liability theory. *Id.* at 17a n.*.

REASONS FOR GRANTING THE PETITION

This case involves an exercise by a federal court of the "grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The premise for the court of appeals' holding was its determination that Section 2252 does not require proof that the defendant knew that the materials at issue involved minors. That premise is incorrect. In any event, the court should have read a scienter requirement into the statute to avoid holding it unconstitutional.

1. Section 2252(a)(1) provides that any person who "knowingly transports or ships * * * any visual depiction * * * involv[ing] the use of a minor engaging in sexually explicit conduct" has committed a felony. Section 2252(a)(2) provides that any person who "knowingly receives, or distributes, any visual depicition * * * involv[ing] the use of a minor engaging in sexually explicit conduct" has committed a felony. In our view, the function of the word "knowingly" in subsections (a)(1) and (a)(2) is not limited to modifying the terms "transports," "ships," "receives," and "distributes," as the Ninth Circuit held. Rather, the word also requires knowledge that the item transported, shipped, received, or distributed is a depiction of a minor engaging in sexually explicit conduct. Such a construction is sensible, since there is no apparent reason why Congress would want to ensure that the defendant would be convicted only if he knew that he was transporting, shipping, receiving, or distributing something, but did not care whether the defendant knew that the material

was child pornography. In *Hamling* v. *United States*, 418 U.S. 87 (1974), the Court gave such a common-sense construction to 18 U.S.C. 1461, which makes it a crime to "knowingly use[ ] the mails for the mailing * * * of anything declared by this section * * * to be nonmailable"—*i.e.*, obscene. See 418 U.S. at 119. The Court construed "knowingly" in Section 1461 to require knowledge not only of the mailing but also of the "character and nature of the materials" mailed. 418 U.S. at 123. Thus, although the Ninth Circuit's "interpretation may be correct grammatically, it is not reasonable nor consistent with principles underlying constitutional interpretation of statutes and the courts' obligation to construe statutes to avoid unconstitutionality if possible." *United States* v. *Prytz*, 822 F. Supp. 311, 321 (D.S.C. 1993).

Our reading of the statute also finds strong support in the legislative history. Section 2252 was added to the bill that ultimately became the Protection of Children Against Sexual Exploitation Act of 1977 as the result of an amendment proposed by Senator Roth. During the floor debate on the bill, Senator Percy stated that he assumed that the term "knowingly" in the proposed amendment meant that "the distributor or seller must have either, first, actual knowledge that the materials do contain child pornography depictions or, second, circumstances must be such that he should have had such actual knowledge, and that mere inadvertance [*sic*] or negligence would not alone be enough to render his actions unlawful." 123 Cong. Rec. 33,050 (1977). Senator Roth replied, *ibid.*:

> That is absolutely correct. This amendment, limited as it is by the phrase "knowingly," insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography and thereby are actively contributing to the maintenance of this form of child abuse are subject to prosecution under this amendment.

Senator Percy then asked whether a bookseller could be prosecuted under Section 2252 "if a book or magazine which happened to contain prohibited material is discovered in his shop." 123 Cong. Rec. 33,050 (1977). Senator Roth responded that Section 2252 "creates no affirmative duty to inspect on the part of the distributor or seller, though it would certainly apply to one who actively and affirmatively endeavors to conceal his knowledge." 123 Cong. Rec. 33,050 (1977). This exchange between Senators Percy and Roth clearly shows that the word "knowingly" was meant to require knowledge on the defendant's part that he was trafficking in child pornography.[3]

2. Even assuming that the word "knowingly" in Section 2252 does not require proof that the defendant knew that he was dealing with child pornography, it does not follow that the statute defines a strict liability offense in that regard. This Court has recognized that "[c]riminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand.' " *United States* v. *Bailey*, 444 U.S. 394, 402 (1980), quoting *Morissette* v. *United States*, 342 U.S. 246, 251 (1952). "[T]he failure of Congress explicitly and

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[3] Congress deliberately omitted the use of the word "knowingly" in 18 U.S.C. 2251, which proscribes the production of child pornography and which also was enacted as part of the 1977 Act. The Conference Committee report points out that the word was omitted from Section 2251 "with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child." S. Rep. No. 601, 95th Cong., 1st Sess. 5 (1977); H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977). It follows that, in including the word "knowingly" in Section 2252, Congress must have intended to import such a knowledge requirement.

unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law." *Liparota* v. *United States*, 471 U.S. 419, 426 (1985). Instead, some clear indication that Congress intended to create a strict liability offense is necessary "to justify dispensing with an intent requirement." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

In this case, it is clear from the legislative history that Congress did not intend to dispense with a *mens rea* element concerning the minority of the person depicted engaging in sexually explicit acts. Accordingly, it would be wholly appropriate for the courts to infer such an element. Indeed, reading a *mens rea* element into the statute—or, for that matter, construing the language of the statute to import such an element—would be in keeping with the general rule requiring courts to construe statutes "to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward D. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).

In determining what mental state is required in the absence of express direction from Congress, the Court has held that it is ordinarily enough if a defendant acts "knowingly." See *Bailey*, 444 U.S. at 408; *United States Gypsum Co.*, 438 U.S. at 444. The general rule requiring that the defendant act with knowledge is appropriately called into play with respect to the minority of the person depicted under Section 2252. To obtain a conviction under Section 2252, the government should be required to prove that the defendant transported, shipped, distributed, or received material that he knew

depicted minors engaging in sexually explicit acts.[4]

3. No other court of appeals has had occasion to consider whether Section 2252 is unconstitutional on the ground that it fails to require proof that the defendant knew that the person depicted engaging in sexually explicit acts is a minor.[5] In other contexts, however, various courts of appeals have concluded or assumed that Section 2252 requires proof of such knowledge. That construction of Section 2252 conflicts with the construction adopted by the Ninth Circuit.

For example, in *United States* v. *Garot*, 801 F.2d 1241 (10th Cir. 1986), the defendant argued that child pornography found in his bedroom should not have been admitted as extrinsic evidence at his trial for receiving

[4] To establish knowledge, it is generally enough that the government show that the defendant "willfully blinded" himself to facts showing that he was dealing with proscribed materials. See, *e.g.*, *United States* v. *Picciandra*, 788 F.2d 39, 46-47 (1st Cir.), cert. denied, 479 U.S. 847 (1986); *United States* v. *Graham*, 739 F.2d 351, 352-353 (8th Cir. 1984); *United States* v. *Burns*, 683 F.2d 1056, 1059 (7th Cir. 1982); see also 123 Cong. Rec. 33,050 (1977) (Sen. Roth stated that Section 2252 "creates no affirmative duty to inspect on the part of the distributor or seller, though it would certainly apply to one who actively and affirmatively endeavors to conceal his knowledge"). For that reason, it is not likely to make a difference in many cases whether the Court adopts a "knowledge" standard or a "recklessness" standard, the standard that Judge Kozinski stated was appropriate.

[5] One district court has considered the issue, however, and explicitly rejected the Ninth Circuit's position. *United States* v. *Prytz*, 822 F. Supp. at 320-321. After noting that "[t]he Ninth Circuit apparently stands alone in its reasoning that § 2252 is unconstitutional," the court said that it "joins the majority and finds that the language of § 2252 imposes a scienter element as to the nature of the proscribed visual depictions" such that "Section 2252(a)(2) requires that the defendant 'knowingly' receive or reproduce child pornography." *Id.* at 321.

other materials in violation of Section 2252. The court of appeals held that the evidence was properly admitted because it was "vital to proof of [the defendant's] knowledge of the contents" of the material he received. 801 F.2d at 1247. The court explained that the exhibits were "particularly relevant to proof of *scienter* * * *, because they show previous interest in child pornography." *Ibid.*

In *United States* v. *Brown*, 862 F.2d 1033 (3d Cir. 1988), the defendant ordered three child pornography videos, but was sent a different video instead. Since the defendant knew the video he received was child pornography, the court deemed it irrelevant that he had not ordered that film, because "the recipient need only know that the material he receives is child pornography." *Id.* at 1036. The court further had "no difficulty with the admission into evidence of the child pornography" found in the defendant's home, which was admitted under Fed. R. Evid. 404(b) to show proof of intent or absence of mistake. 862 F.2d at 1038-1039 n.6. Similarly, in *United States* v. *Marchant*, 803 F.2d 174 (5th Cir. 1986), the court of appeals rejected the defendant's claim that he had ordered adult pornography and was sent child pornography by mistake, noting the numerous "Lolita" magazines found in the defendant's possession. *Id.* at 177.

In *United States* v. *Duncan*, 896 F.2d 271 (7th Cir. 1990), the defendant challenged his convictions for violating Section 2252 on the ground that he did not know that the photographs he had ordered depicted children (rather than adults) engaging in sexually explicit acts. In rejecting that claim, the court of appeals did not question the validity of the defendant's premise that Section 2252 requires knowledge on his part that the photographs were child pornography. Rather, the court

found that the brochure from which the defendant had ordered the photographs was "sufficiently clear and sufficiently explicit to make anyone, let alone [the defendant], a collector of this material and a college professor assumed to be above average in intelligence, aware of the fact that child pornography was being offered." 896 F.2d at 278.

The facts of this case showed that respondent Gottesman was well aware that he was selling child pornography. Accordingly, the court of appeals should have affirmed respondents' convictions.[6] Moreover, as a result of the court's decision, the federal government may not bring prosecutions under Section 2252 in the Ninth Circuit. That Circuit includes Los Angeles and Las Vegas, where a large amount of child pornography has been produced, and from which it is shipped and distributed. Furthermore, the decision will inevitably lead to the filing of numerous collateral challenges to convictions under Section 2252, since anyone who was convicted under Section 2252 now has support for the argument that his conviction is invalid.

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[6] Judge Kozinski was incorrect in finding that respondents were "tried under a theory which imposed strict liability as to the age of the minor." App., *infra*, 17a n.*. To the contrary, the district court held that "the [g]overnment was required to prove and did prove scienter by showing that [respondents] knew that the person depicted in the videotapes was under 18 years of age," and found as a fact that respondent Gottesman "knew that Traci Lords was under age when she made the films [respondents] transported or shipped in interstate commerce." *Id.* at 39a ¶ 7, 41a ¶ 2. Although the district court stated on remand following the Ninth Circuit's decision in *Thomas* that the government did not have to prove that Gottesman knew that Lords was under age, *id.* at 36a ¶ 2, it did not retract its finding of fact, which is amply supported by the record.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

NOVEMBER 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 89-50556 and 89-50562

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

X-CITEMENT VIDEO, INC., DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RUBIN GOTTESMAN, DEFENDANT-APPELLANT

Argued and Submitted March 5, 1992.
Decided Dec. 16, 1992.

Appeal from the United States District Court
for the Central District of California

Before CANBY, KOZINSKI and FERNANDEZ, Circuit Judges.

CANBY, Circuit Judge:

Defendant Rubin Gottesman appeals his conviction, after a bench trial, for violating the Protection of Children Against Sexual Exploitation Act of 1977 ("Act"), 18 U.S.C. § 2251 *et seq.* (1988). Gottesman was convicted of violating sections 2252(a)(1) and (a)(2) of the Act, which prohibit the distribution, receipt, or shipping of child pornography. Gottesman challenges the Act as unconstitutional, both on its face and as applied. We conclude that the Act is unconstitutional on its face and, therefore, reverse.

FACTUAL BACKGROUND

In 1986 and 1987, an undercover police officer contacted Gottesman, the operator of X-Citement Video, Inc., and expressed interest in buying pornographic videotapes featuring one Traci Lords. The officer stated that he wanted tapes that Lords had made when she was under the age of 18. Gottesman eventually sold two sets of such tapes: the first was a box of 49 tapes that he sold directly to the police officer; the second was a box of 8 tapes that Gottesman sold to the police officer and sent (per the police officer's instructions) to Hawaii.

A federal grand jury indicted Gottesman for distributing, shipping, and conspiring to distribute and ship child pornography in violation of 18 U.S.C. § 2252. After a bench trial, Gottesman was convicted on these counts; the district court sentenced him to 12 months incarceration and ordered him to pay a $100,000 fine.

After he had filed a notice of appeal to this court, Gottesman requested a remand to the district court for reconsideration in light of *United States v. Thomas*, 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S.

826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990), which we granted. Gottesman then asserted before the district court, first, that *Thomas* had ruled that section 2252 lacked a requirement that a defendant know that he is distributing or shipping child pornography, and, second, that, as construed, section 2252 on its face violates the First and Fifth Amendments to the U.S. Constitution. The district court rejected these arguments and upheld the constitutionality of section 2252.

On appeal, Gotteman contends that Section 2256 of the Act[1] is unconstitutional on its face because it is

[1] Section 2256 provides that:

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape;

(6) "computer" has the meaning given that term in section 1030 of this title; and

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.

vague and overbroad; section 2252 of the Act[2] is unconstitutional on its face because it does not require scienter;[3] and the Act, as applied, violates the First and Fifth Amendments because the tapes at issue are not child pornography. We reject the challenges to section 2256 but agree that section 2252 is

[2]The relevant portions of Section 2252 provide that:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * * * *

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates paragraph (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined under this title and imprisoned for not less than five years nor more than fifteen years.

[3] Gottesman also argues that the indictment was insufficient because it did not allege scienter. In light of our ruling on the constitutionality of the Act, we do not address this issue.

unconstitutional on its face, we do not reach Gottesman's argument about the Act as applied.

DISCUSSION

I. *Does Section 2256 Render the Act Unconstitutionally Vague and Overbroad?*

A. Is the Act Unconstitutionally Overbroad Because it Raises the Statutory Age of Majority from 16 to 18?

Gottesman asserts that section 2256[4] of the Act—its definitional section—is facially unconstitutional because it renders the Act applicable to depictions of those under the age of 18, whereas the statute upheld in *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), set the age of majority at 16. *See Ferber,* 458 U.S. at 774, 102 S.Ct. at 3363 (rejecting constitutional challenges to statute prohibiting promotion or distribution of sexual performances by children under the age of 16). Gottesman argues that adding two years to the age of majority renders the Act unconstitutionally overbroad. He contends that it is far more difficult to determine when a person is under 18 than it is to determine when he or she is under 16. The result, according to Gottesman, is that distribution of sexually explicit material becomes such a hazardous profession that its practitioners will refuse to handle materials involving persons anywhere near the age of 18, thus restricting protected expression involving, for example, 23- or 25-year-olds.

[4] Gottesman refers to this section as § 2255. The difference is inconsequential: Section 2255 was recently renumbered as § 2256, and they are otherwise identical.

The Supreme Court stated in *Ferber* that it would invalidate a statute for overbreadth "only as a last resort.'. . . [T]he overbreadth involved [must] be 'substantial' before the statute involved will be invalidated on its face." *Ferber,* 458 U.S. at 769, 102 S.Ct. at 3361 (citation omitted). Although Gottesman's argument is not without some force, we see no basis for concluding that any overbreadth here is sufficiently greater than that attending a 16-year age line to compel a different result. Indeed, we would not lightly hold that the Constitution disables our society from protecting those members it has traditionally considered to be entitled to special protections—minors. Gottesman merely quotes a district court case discussing the Act's raising of the age of majority from 16 to 18, *United States v. Kantor,* 677 F.Supp. 1421 (C.D.Cal.1987), *vacated, mandate granted, United States v. United States District Court for the Central District of California,* 858 F.2d 534 (9th Cir. 1988), and a series of Supreme Court cases that permit "adult" treatment of 16- and 17-year-olds. *See, e.g., Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (permitting capital punishment for 16- and 17-year-olds). With respect to the former, *Kantor* did state that the Act seemed overbroad, but it also refused to strike down the statute on its face, in light of *Ferber.* With respect to the Supreme Court cases, they merely permit, rather than require, adult treatment of 16- and 17-year-olds. Moreover, they indicate nothing about the substantiality (or lack thereof) of the overbreadth of section 2256. Thus, Gottesman's arguments are far from sufficient to overcome the presumption against invalidating a statute on its face for overbreadth.

B. Does Section 2256 Render the Act Unconstitutionally Overbroad or Vague Because it Substitutes "Lascivious" for "Lewd"?

Gottesman contends that section 2256 is overbroad and vague because Congress replaced "lewd" with "lascivious" in defining illegal exhibition of the genitals of children. *See* 18 U.S.C. § 2256(2)(E). In so arguing, he ignores *United States v. Wiegand,* 812 F.2d 1239 (9th Cir.), *cert. denied,* 484 U.S. 856, 108 S.Ct. 164, 98 L.Ed.2d 118 (1987), in which we rejected a similar argument, stating that "[l]ascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld in *Miller v. California* [413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)] and in *Ferber.*" *Wiegand,* 812 F.2d at 1243 (citations omitted). We adhere to the view expressed in *Wiegand.*

C. Does Section 2256 Render the Act Unconstitutionally Overbroad or Vague Because it Prohibits Actual or Simulated Bestiality and Sadistic or Masochistic Abuse?

Gotteman asserts that section 2256 is overbroad and vague because it includes among the covered acts, without further definition, actual or simulated bestiality and sadistic or masochistic abuse. 18 U.S.C. § 2256(2). This argument was essentially answered in *Ferber,* which upheld the constitutionality of a similar statute. The relevant section of the statute at issue in *Ferber* defined the prohibited sexual conduct as " 'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.' " 458 U.S. at 751, 102 S.Ct. at 3351.

Gottesman focuses on three differences between section 2256 and the statute in *Ferber*: First, he argues that section 2256's prohibition of "simulated" acts renders it overbroad and vague. The statute in *Ferber* also prohibited "simulated" acts, however, and the structure of the sentence suggests that "simulated" modified all the acts on the list. Thus, there is no meaningful distinction between section 2256 and the *Ferber* statute in this regard. Second, Gottesman focuses on section 2256(2)(D)'s alleged inclusion of "sadistic or masochistic; abuse." The semicolon before "abuse" is a typographical error in the unofficial code, however; the official version of section 2256(2)(D) states "sadistic or masochistic abuse." *Compare* 18 U.S.C. § 2256(2)(D) (1988) *with* 18 U.S.C.A. § 2256(2)(D) (West Supp. 1992). The only difference between section 2256 and the *Ferber* statute, therefore, is the former's replacement of "sado-masochistic abuse" with "sadistic or masochistic abuse." The two terms are indistinguishable. The final difference that Gottesman cites is that the *Ferber* statute prohibited "sexual bestiality," whereas section 2256 refers only to "bestiality." Gottesman suggests that, under section 2256, "bestiality" could be read to encompass its entire dictionary definition, so that it would also prohibit, e.g., "the display, gratification, or an instance of bestial traits or impulses." *Webster's International Dictionary* (3rd ed. 1966). In context, however, such a reading would not be justified; "bestiality" is listed as a subcategory of "sexually explicit conduct." The term can hardly be interpreted to mean "acting beastly"; properly construed, the term is no different from *Ferber's* "sexual bestiality."

Thus, we reject all of Gottesman's vagueness and overbreadth challenges to the Act.

II. *Does Section 2252 Render the Act Unconstitutional Because it Does Not Require Proof of Scienter that the Materials Distributed Are Child Pornography?*

Gottesman's other facial challenge to the Act is that section 2252—the section prohibiting, *inter alia*, the distribution or receipt of child pornography—violates the guarantee of free speech under the First Amendment and the guarantee of due process under the Fifth Amendment because it does not require that the prosecution demonstrate the defendant's knowledge of the age of the performers. Gottesman argues that: (1) section 2252 does not include a scienter requirement regarding the minority of the performers; and (2) the lack of a scienter requirement violates the First and Fifth Amendments to the Constitution.

A. What Showing of Scienter Does Section 2252 Require?

The main point of contention between the parties is over the scienter requirement of section 2252. Gottesman contends that section 2252 does not require knowledge of the minority of the performers, whereas the government argues that section 2252 requires knowledge of "the nature and character of the material." The government's position is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but argues that it does not require that the distributor know the age of the performers. Of course, it would make no difference under any construction of the statute if the defendant did not know precisely whether the underage performer was age 6, 7 or 8. What the government seems to be saying in its brief, however, is that the statute does not even require

that the defendant know that one or more performers was under the age of 18, so long as he knew the general nature of the materials he was distributing.

We ruled on the question of the scienter required by the Act in *Thomas*, in which the defendant was accused of violating section 2252. Thomas, like Gottesman in the instant case, argued that section 2252 requires knowledge of the minority of the performer, and that, therefore, the indictment was insufficient because it failed to allege that Thomas knew that the pornography he transported depicted a minor. After setting forth section 2252, we stated that

> In subsection 1, "knowingly" modifies only "transports or ships." In subsection 2, "knowingly" modifies only "receives." *The section [2252], therefore, does not require that Thomas knew that the pornography he transported, mailed, and received involved a minor. The section requires only that Thomas knowingly transported and received the material.*

893 F.2d at 1070 (emphasis added). Thus, *Thomas* held that section 2252 does not require knowledge that the material involves a minor. In fact, *Thomas* indicates that section 2252 does not require any knowledge of the contents of the material; the only scienter requirement of section 2252 is the defendant's knowledge that he mailed the material.

The government does not attempt to distinguish *Thomas*, but rather relies on *United States v. Moncini*, 882 F.2d 401 (9th Cir. 1989). In *Moncini*, the defendant argued that section 2252 requires the government to prove that a defendant knew that mailing child pornography was illegal. We rejected this argument, stating that "[s]ection 2252(a) requires that the government prove that the defendant had knowledge of the nature of the contents of the visual depictions and that the depictions were to be transported or shipped," but that no more was required. *Id.* at 404. Thus, we held that section 2252 did not require knowledge of the illegality of mailing child pornography. *See also United States v. Brown*, 862 F.2d 1033, 1036 (3rd Cir. 1988) (under section 2252 "recipient need only know that the material he receives is child pornography").

The problem with the government's reliance on *Moncini* is that its statement that knowledge of the contents is required is dictum. In *Moncini*, the question before us was whether section 2252 requires knowledge of the illegality of the mailings; the statement regarding knowledge of the contents was unnecessary to our ruling. In *Thomas*, on the other hand, the defendant squarely raised the question of whether section 2252 requires knowledge that the performers are under the age of 18. Our statement that section 2252 requires no such knowledge constituted part of our ruling. Thus, *Thomas* is the only precedent from this circuit on the question of whether section 2252 requires scienter of the minority of the performers. We are bound by its conclusion that section 2252 contains no such requirement.

B. What Level of Scienter Does the Constitution Require?

Gottesman contends—and the government does not dispute—that a statute prohibiting the distribution of printed or taped materials that does not require some knowledge of the contents of the material violates the First and Fifth Amendments of the U.S.

Constitution. The Supreme Court so ruled in *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). In *Smith,* the Court held that the First Amendment prohibits prosecution of a book distributor for possession of an obscene book unless the distributor has "knowledge of the contents of the book." 361 U.S. at 153, 80 S.Ct. at 218. *See Ferber,* 458 U.S. at 765, 102 S.Ct. at 3358 ("As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."); *see also Osborne v. Ohio,* 495 U.S. 103, 115, 110 S.Ct. 1691, 1699, 109 L.Ed.2d 98 (1990) (noting "the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter").

The *Smith* opinion did not delineate the level of scienter that the Constitution requires. In *Hamling v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) and *Ripplinger v. Collins,* 868 F.2d 1043 (9th Cir. 1989), however, the constitutional requirements were clarified somewhat. In *Hamling,* a defendant convicted of distributing obscene material argued that the government was required to prove that he knew that the material was obscene. The Supreme Court, in rejecting this argument, stated that: "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling,* 418 U.S. at 123, 94 S.Ct. at 2910. We applied *Hamling* in *Ripplinger,* finding a statutory definition unconstitutional on its face because it did not require actual knowledge of the contents of the pornographic material. In so ruling, we indicated that a statute must require knowledge of the character of the materials

in order to pass constitutional muster. *Ripplinger,* 868 F.2d at 1056.

In purporting to apply these principles here, the government once again skates a very fine line in its brief. It concedes that, to be constitutional, the statute must require knowledge of the nature and character of the material, and it sometimes formulates this requirement as knowledge that the material is "child pornography." On the other hand, it appears to resist a requirement of proof that the defendant know that one or more performers were underage. It emphasizes that the Constitution does not require knowledge by the defendant of the actual age of the underage performer. Of course that must be true. The question, however, is whether it requires knowledge that one or more performers was under age 18. In at least part of its argument, the government seems to suggest that there is no such requirement:

> Thus, the scienter required by the child pornography statutes is analogous to that required for obscenity convictions—general knowledge of the nature of the contents of the materials, not knowledge of the specific age of the minor. *See also United States v. Thomas,* 893 F.2d 1066, 1070 (9th Cir. 1990) (section 2252(a) does not require proof that defendant knew that pornography involved a minor). . . .

Government's brief, p. 17. At oral argument, the government moved away somewhat from this perch and conceded that the statute would have severe constitutional problems if it did not include a requirement of knowledge that at least one performer engaged in the specified sexually explicit acts was under 18 years of age.

Whatever the government's position, we conclude that the constitutional minimum requirement of scienter for the Act's proscription of transporting or receiving child pornography is knowledge that at least one of the performers is under age 18. It is true that, in *Hamling*, it was not necessary that the violator know that the material he was distributing was obscene. But the Supreme Court's point was that it was not essential that the violator know the *legal* status of the materials; he could not "avoid prosecution by simply claiming that he had not brushed up on the law." *Hamling*, 418 U.S. at 123, 94 S.Ct. at 2911. The question before us does not concern the defendant's requisite knowledge of the law; it concerns his knowledge of a particular fact—the underage of the performer.

Our decision in *United States v. United States District Court for the Central District of California*, 858 F.2d 534 (9th Cir. 1988), is highly instructive. There we dealt with charges under section 2251(a) of the Act against producers of films also featuring the redoubtable Traci Lords; the issue was whether the producers were entitled to an affirmative defense that they were deceived by Lords into believing that she was an adult. We held that the First Amendment required that provision for such a defense be engrafted onto the Act. *Id.* at 538-44. We declined to hold, however, that the Constitution required knowledge of the minority of the performer to be an element of the offense. Our reasons for so declining are most relevant here:

> Defendants would have us go farther and hold that the first amendment requires the government to prove scienter as part of its case. They rely on the Supreme Court cases holding that the

> government must carry such a burden in cases involving booksellers and other downstream distributors. *See, e.g., Hamling*, 418 U.S. at 123, 94 S.Ct. at 2910. We do not view these cases as controlling here. Those who arrange for minors to appear in sexually explicit materials are in a far different position from those who merely handle the visual images after they are fixed on paper, celluloid or magnetic tape. While it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of the actors with whom they have had no direct contact, *see Smith*, 361 U.S. at 153-54, 80 S.Ct. at 218-19, producers are in a position to know or learn the ages of their employees. We note that several states have taken this approach. . . .

Id. at 543-44 n. 6. These considerations concerning distributors or receivers are directly applicable here, and we find them compelling. Section 2252 potentially applies to all kinds of recipients or distributors of videotapes and magazines. To render them all prima facie criminals if one of the performers in a portrayal of sexually explicit conduct is underage, without the distributor's or recipient's knowledge, would be to create precisely the kind of chilling effect condemned by *Smith*. That we cannot do consistently with the First Amendment as the Supreme Court has interpreted it.

We conclude, therefore, that the First Amendment mandates that a statute prohibiting the distribution, shipping or receipt of child pornography require knowledge of the minority of the performers as an element of the crime it defines. Section 2252, as

authoritatively construed by *Thomas*, does not so require.

The question then arises whether, in the face of *Thomas*, we could construe section 2252 so as to save its constitutionality. In *District Court*, we engrafted an affirmative defense onto section 2251(a) in order to save it. Despite that example, we do not feel free to follow an analogous course here. First, it comes closer to judicial rewriting of a statute to engraft onto it an element of the crime than it does to recognize an affirmative defense, of a type that often exists without being specified in the statute defining the crime. *See District Court*, 858 F.2d at 542. Second, *Thomas* decided the precise question whether knowledge of the performer's underage was an element of 2252, and it cited *District Court* for the analogous proposition that scienter was not an element of section 2251. *Thomas*, then, was decided in full knowledge of *District Court* and its rationale. *Thomas* nevertheless ruled squarely that scienter of the minority of the performer was not an element of the crime defined by section 2252. Not sitting as an en banc court, we regard ourselves as bound by *Thomas*'s interpretation.

CONCLUSION

In summary, then, we conclude that the First Amendment to the United States Constitution mandates that a statute prohibiting the distribution, shipping or receipt of child pornography require as an element knowledge of the minority of at least one of the performers who engage in or portray the specified conduct. Section 2252, as authoritatively construed by *Thomas*, does not so require. As a result, section

2252 is unconstitutional on its face. Gottesman's conviction therefore cannot stand.

REVERSED.

KOZINSKI, Circuit Judge, dissenting in part.*

What makes this case hard is that most of the materials defendant distributes are protected by the First Amendment. The thought that someone in his position might be convicted, despite an innocent mind, because of a short scene in one videotape among the thousands he carries in stock, should give pause to anyone concerned about free speech. I therefore agree with my colleagues that a child pornography statute must contain a mens rea requirement. But I do not agree that Gottesman must have *known* the videos he sold depicted child pornography; recklessness on his part would have sufficed. Moreover, under our traditional rules of construction, we can read a recklessness mental state into the statute, to bring it in line with the Constitution. Indeed, we have a duty to do so.

I

Part II(B) of the majority opinion answers the question: "What level of scienter does the Constitution require?" It concludes that a defendant in a child pornography case must be proven to have "knowledge

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* Strictly speaking, this is a concurrence, because I too would reverse Gottesman's conviction on the ground that he was tried under a theory which imposed strict liability as to the age of the minor. I style it a dissent, however, because I would avoid striking down an Act of Congress, and would remand for a retrial under a statute properly narrowed to comply with constitutional norms.

of the minority of at least one of the performers." Maj. op. at 1292. In reaching this conclusion, the majority relies on *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), which holds that, under a child pornography statute, "[a]s with obscenity laws, criminal responsibility may not be imposed without *some* element of scienter." *Id.* at 765, 102 S.Ct. at 3358 (emphasis added). But *Ferber* did not say what level of scienter is sufficient in a child pornography case, whether it be purposefulness, knowledge, recklessness, negligence, or something else altogether.

The Supreme Court answered this question eight years later in *Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). *Osborne* upheld a statute that outlawed the possession of child pornography where the defendant either knew the performers were underage or was at least reckless as to this fact. The Court considered Osborne's argument that the statute was "unconstitutionally overbroad because it applied in instances where viewers or possessors lack scienter," and rejected it because "[a]lthough [the challenged statute] does not specify a mental state, Ohio law provides that recklessness is the appropriate *mens rea* where a statute neither specifies culpability nor plainly indicates a purpose to impose strict liability." *Id.* at 113 n. 9, 110 S.Ct. at 1698 n. 9 (internal quotation marks omitted). Recklessness, the Court held, "*plainly satisfie[d]* the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter." *Id.* at 115, 110 S.Ct. at 1699 (emphasis added). The mens rea issue was squarely raised and squarely resolved. I don't understand how the majority can fail

to follow—or even address—this passage from *Osborne*.[1]

The majority is led astray by *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), and *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989)—all adult obscenity cases. *Ferber* did indeed refer to the scienter requirement of obscenity cases such as these when announcing a scienter requirement in child pornography cases, but only by way of analogy. 458 U.S. at 765, 102 S.Ct. at 3358. In fact, *Ferber* blazed a trail for child pornography quite separate from that for obscenity. This distinction is rooted in the government's greater power to prohibit child pornography. The *Ferber* Court painfully catalogued the harms sexual exploitation inflicts on children, demonstrating the surpassing importance of the government's interests in this area. *Id.* at 756-62, 102 S.Ct. at 3354-57;[2] *accord Osborne*,

[1] *Osborne* might be distinguished because it is a possession case, not a distribution case. However, this distinction cuts entirely the wrong way for the defendant here. Under *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), the state has more latitude to proscribe the distribution of materials not protected by the First Amendment than it does when prohibiting their private possession. *Id.* at 568, 89 S.Ct. at 1250 ("States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.") If recklessness was scienter enough to convict Osborne for his private possession of child pornography, it is certainly enough to convict Gottesman for distributing it.

[2] The Court recognized that "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," 458 U.S. at 759, 102 S.Ct. at 3355; that "the advertising and selling of child pornography provide an economic motive for and are thus an integral

495 U.S. at 109-10, 110 S.Ct. at 1696-97. Because these interests provide a far more compelling basis for prohibiting child pornography than adult pornography,[3] the Court in *Ferber* cast child pornography

part of the production of such materials, an activity illegal throughout the Nation," *id.* at 761, 102 S.Ct. at 3357; and that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis," *id.* at 762, 102 S.Ct. at 3357. Noting the strength of the government interest in "safeguarding the physical and psychological well-being of . . . minor[s]," *id.* at 756-57, 102 S.Ct. at 3354, the Court said it would "not second-guess [New York's] legislative judgment . . . that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," *id.* at 757-58, 102 S.Ct. at 3355.

The scars of child pornography can last a lifetime. As adults, those exploited as minors may be under pressure to rationalize their conduct, even though they bear no moral responsibility for it. Consider the words of the 24-year old Traci Lords: "I don't think I did anything that special or weird or different. The only difference was that I did it on video. Every teenage cheerleader runs around, screws half the football team, and takes drugs. The major difference is that the evidence of my doing it existed on the shelves of video stores." Michael Kaplan, *The House of Lords,* Movieline, Jan./Feb. 1993, at 71, 72.

[3] Pornography featuring adults can be regulated to protect unwilling recipients and juveniles from offensive exposure, *Miller v. California*, 413 U.S. 15, 18-19, 93 S.Ct. 2607, 2611-12, 37 L.Ed.2d 419 (1973), and to vindicate society's interest in order and morality, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (1973). Because these interests are weaker than that in protecting children from appearing in sexually explicit materials, the state may prohibit non-obscene child pornography but only obscene adult pornography. *Miller*, 413 U.S. at 23, 93 S.Ct. at 2614.

Of course, many have argued—and many more have disagreed with them—that, just as the child pornography trade harms children, adult pornography harms both the people who appear in the materials, and the people who are hurt by the attitudes these materials foster. But society's interest in avoiding these harms has been held to not justify restricting speech. *See American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986). *But see* Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L. L.Rev. 1 (1985); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589. *See generally* Gerald Gunther, *Constitutional Law* 1125-26 & n. 1 (12th (wheeled) ed. 1991) (as usual, most of the action is in the footnote).

outside the umbrella of the First Amendment, without regard to whether the materials in question were obscene. 458 U.S. at 764, 102 S.Ct. at 3358.

All this means that obscenity precedents just don't work in the child pornography context. For instance, private possession of child pornography can be criminalized, *Osborne*, 495 U.S. at 108, 110 S.Ct. at 1695, while private possession of obscene material cannot, *Stanley v. Georgia*, 394 U.S. 557, 568, 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969).[4] Similarly, child pornography can be barred even if it doesn't appeal to prurient interests, even if it isn't patently offensive and even without considering the work as a whole. *Ferber*, 458 U.S. at 764, 102 S.Ct. at 3358. *But see Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Justices Brennan and Marshall, consistent dissenters in the court's major obscenity cases, concurred in *Ferber*. *Compare Miller*, 413 U.S. at 47, 93 S.Ct. at 2627 (Brennan, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73, 93 S.Ct. 2628, 2642, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting), *with Ferber*, 458 U.S. at 775, 102 S.Ct. at 3364 (Brennan, J., concurring).

[4] "[W]e find this case distinct from *Stanley* because the interest underlying child pornography prohibitions far exceed the interest justifying the Georgia law at issue in *Stanley*." *Osborne*, 495 U.S. at 108, 110 S.Ct. at 1695.

Just as telling is the Court's more relaxed approach to scienter in child pornography cases. *Osborne*'s one short paragraph in the text, 495 U.S. at 115, 110 S.Ct. at 1699, and two equally laconic sentences in an omnibus footnote disposing of two unrelated claims, *id.* at 112 n. 9, 110 S.Ct. at 1698 n. 9, stand in stark contrast to other First Amendment cases where the Court agonized at length over the scienter issue. *See, e.g., Smith,* 361 U.S. at 150-55, 80 S.Ct. at 217-20 (scienter required for obscenity prosecution); *Hamling,* 418 U.S. at 118-24, 94 S.Ct. at 2908-11 (knowledge of nature and character of materials rather than knowledge of their legal status as obscenity is proper mental state for obscenity prosecution); *see also New York Times Co. v. Sullivan,* 376 U.S. 254, 279-83, 84 S.Ct. 710, 725-28, 11 L.Ed.2d 686 (1964) (announcing actual malice requirement in defamation action by public figure); *Masson v. New Yorker Magazine, Inc.,* —— U.S. ——, —— - ——, 111 S.Ct 2419, 2431-33, 115 L.Ed.2d 447 (1991) (fleshing out actual malice standard as applied to defamatory statements in the form of inaccurate direct quotations).

These distinctions bear out the original observation in *Ferber* that "the States are entitled to greater leeway in the regulation of pornographic depictions of children" than in regulation of obscenity. They cast serious doubt on any analysis that relies on obscenity cases in the child pornography context. *Id.* 458 U.S. at 756, 102 S.Ct. at 3354.[5] *Osborne* is the relevant

[5] For a discussion of the doctrinal isolation of child pornography cases and the need for separate standards to decide them, see Frederick Schauer, *Codifying the First Amendment: New York v. Ferber,* 1982 Sup.Ct.Rev. 285, 287-88 & 308-09:

> [*Ferber* created] yet another comparatively distinct area of First Amendment doctrine. The rules relating to child pornography now take their place alongside the equally distinct rules relating to obscenity, defamation, advocacy of illegal conduct, invasion of privacy, fighting words, symbolic speech, and offensive speech. Moreover, each of these areas contains its own corpus of subrules, principles, categories, qualifications, and exceptions. . . . When we take all this together it becomes clear that the First Amendment is becoming increasingly intricate. . . .

Id. at 308-09. Schauer generally applauded the Court's segregation of child pornography and obscenity into more distinct categories for purposes of First Amendment scrutiny. However, he presciently flagged as a potential pitfall precisely the kind of mistake the majority makes here: "Extreme subdivision of the First Amendment magnifies the risk that an increasingly complex body of doctrine, even if theoretically sound, will be beyond the interpretative capacities of those who must follow the Supreme Court's lead—primarily lower court judges, legislatures, and prosecutors." *Id.* at 288.

authority and *Osborne* holds that recklessness is a sufficient mental state to support a conviction in a child pornography case.

II

A. All of this would be beside the point if, as the majority suggests, *United States v. Thomas,* 893 F.2d 1066 (9th Cir.), *cert. denied,* 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990), conclusively held that 18 U.S.C. § 2252(a) is a strict liability statute. But *Thomas* addressed only a very narrow question: Does section 2252(a), *as a matter of simple statutory construction,* require the government to prove the defendant knew the materials contained child pornography? All *Thomas* tells us is that the word "knowingly" in the statute does not apply to the age of the depicted children. 893 F.2d at 1070. This is not much more than we would learn by reading the statute

ourselves. The ruling neither considered nor excluded the possibility that a lower level of scienter, like recklessness, might apply as a matter of *constitutional* interpretation.[6]

The defendant in *Thomas* made no constitutional argument; the *Thomas* court said nothing about the First Amendment. Indeed, had *Thomas* addressed the constitutional issue, it would have been bound by both the Supreme Court's and our own holdings that child pornography can't be a strict liability offense. *Ferber*, 458 U.S. at 765, 102 S.Ct. at 3358; *United States v. United States District Court*, 858 F.2d 534, 540 (9th Cir. 1988) ("*Kantor*") (interpreting a different section of the same statute involved here and in *Thomas*). Had *Thomas* considered the First Amend-

[6] My colleagues may be distracted by *Thomas* because of an unfortunate accident of nomenclature. Both statutory construction and constitutional narrowing are sometimes referred to as interpretation. They are, in fact, very different animals. Statutory interpretation is an attempt to divine the meaning of the statute as passed by Congress and signed by the President. Constitutional narrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there; it is akin to partial invalidation of the statute. *See, e.g., Regan v. Time, Inc.*, 468 U.S. 641, 652-54, 104 S.Ct. 3262, 3268-70, 82 L.Ed.2d 487 (1984). In performing the former task we may not add anything to the statute that is not already there (or ignore anything that is); in performing the latter function, we must do precisely that. In pure interpretation, we must carry out the legislative will. In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe Congress would not have rejected. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988) (courts should construe statutes to avoid unconstitutionality "unless such construction is plainly contrary to the intent of Congress").

ment, it would have had to either follow *Kantor* and read a scienter requirement into the statute, or strike the statute down altogether.

Of course, there is absolutely nothing wrong with the *Thomas* decision. We generally deal only with arguments raised by the parties. *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988). If the defendant did not raise a First Amendment defense, the panel had no obligation to raise it for him. But surely *Thomas*'s failure to decide the constitutional question—how to interpret section 2252(a) in light of the First Amendment—cannot foreclose us from deciding that question now that it's been squarely put to us. *See, e.g., United States v. Vroman*, 975 F.2d 669, 671-72 (9th Cir. 1992).

The majority's supine willingness to be bound by a panel that decided a question different from that posed to us leads to truly paradoxical results. Because of an accident of timing—because the first defendant to challenge section 2252(a) neglected to raise a First Amendment claim—section 2252(a) turns out to be unconstitutional. *See* maj. op. at 1291-92. A neighboring section, 2251(a), is saved because the first case to consider it did present a First Amendment challenge, giving us the opportunity to narrow it. *See Kantor*, 858 F.2d at 542-44.

Our jurisprudence cannot evolve in such a haphazard fashion. Under the majority's reasoning *no* court would be able [to] save section 2252(a). Not *Thomas* because they had no reason to confront the issue; and not we today because we are bound by *Thomas*. Our prudential rule of avoiding unnecessary consideration of issues not put before us by the parties turns into a trap. Giving preclusive force to the never-

contemplated emanations from *Thomas* undermines our duty to save the statute if we can.[7]

B. Because *Thomas* cannot be read to foreclose an issue that it had no reason to reach, it is our job to

[7] First Amendment challenges to statutes often arise long after the statute is first applied. Title VII, for instance, has for over a decade restricted harassing speech in the workplace, but the first reported federal case involving a First Amendment defense was decided only in 1991. *See, e.g., Henson v. City of Dundee*, 682 F.2d 897, 900-01 (11th Cir. 1982); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1534-37 (M.D.Fla. 1991); *see generally* Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law 592-600 (1992). Because First Amendment defenses were rarely raised, harassment law evolved with little concern for free speech, and some workplace harassment cases seem suspect on First Amendment grounds. *See, e.g., Snell v. Suffolk County*, 611 F.Supp. 521, 531-32 (E.D.N.Y. 1985) (injunction banning "any racial, ethnic, or religious slurs . . . in the form of 'jokes,' 'jests,' or otherwise," whether or not severe or pervasive enough to create a hostile work environment), *aff'd*, 782 F.2d 1094 (2d Cir. 1986); *Tunis v. Corning Glass Works*, 747 F.Supp. 951, 955, 959 (S.D.N.Y. 1990) (use of gender-based terms like "foreman" or "draftsman" could be harassment, *aff'd without opinion*, 930 F.2d 910 (2d Cir. 1991). For an excellent discussion of the issue, see Eugene Volokh, Note, *Freedom of Speech and Workplace Harassment*, 39 UCLA L.Rev. 1791, 1800-07 (1992) (describing other cases). *See also* Lindemann & Kadue, *supra;* Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 Ohio St.L.J. 481 (1991); Marcy Strauss, *Sexist Speech in the Workplace*, 25 Harv. C.R.-C.L. L.Rev. 1 (1990).

We may one day conclude that some workplace speech—for instance, a bigoted political poster—is protected even if it creates a hostile work environment. But if this happens, surely the right answer is to save as much of workplace harassment law as we can, not to throw it all out just because a few courts, not faced with First Amendment defenses, may have read it too broadly.

confront it today: Can we save 2252(a) by reading into it a requirement that defendant here acted recklessly as to the age the minor?[8] Not only can we, we must. *See, e.g., Dennis v. United States*, 341 U.S. 494, 499-501, 71 S.Ct. 857, 862-63, 95 L.Ed. 1137 (1950) (plurality opinion).

Statutes often fail to specify mental states for each element of the criminal offense, and courts routinely read scienter into a statute even absent constitutional considerations. *See Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 2088, 85 L.Ed.2d 434 (1985); *United States v. O'Mara*, 963 F.2d 1288, 1292-96 (9th Cir. 1992) (Kozinski, J., concurring). In *Kantor*, we grafted an affirmative defense of reasonable mistake of age onto the statute, something far more exotic than just reading in a mental state element. Having determined under *Ferber* and *Osborne* that the federal child pornography statute is constitutional if only it includes a mens rea requirement, I would pose the same question here as we did in *Kantor*: Would Congress, if given the choice, have passed section 2252(a) with a recklessness requirement as to the age of the minor, or not passed it at all? *Kantor*, 858 F.2d at 542; *see also Regan v. Time, Inc.*,

[8] Which mental state to choose is not entirely clear. In *Kantor*, we stated that "Congress may take steps to punish severely those who knowingly subject minors to sexual exploitation, and even those who commit such abuse recklessly or negligently. . . ." 858 F.2d at 540. We know, after *Osborne*, that recklessness is sufficient, but it is not at all clear that a lesser state of mind, such as negligence, would not suffice to save the statute. *Cf.* Robert R. Strang, Note, *"She Was Just Seventeen . . . and the Way She Looked Was Way Beyond [Her Years]": Child Pornography and Overbreadth*, 90 Colum.L.Rev. 1779, 1801-02 (1990) (providing mistake of age defense to section 2252 prosecution satisfies First Amendment scienter requirement).

468 U.S. 641, 653, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984) (plurality); *id.* at 691-92, 104 S.Ct. at 3289-90 (Powell, J., concurring). To pose the question is to answer it. Congress quite clearly viewed child pornography as an extremely grave problem, one deserving sweeping prohibitions and strict sanctions. It is inconceivable that, given the choice between no statute at all and a statute that contains a requirement of recklessness, those involved in passing the child pornography statute would have chosen the former rather than the latter. In drafting the statute, Congress did delete a knowledge requirement, but I do not read this as precluding any and all scienter requirements. Indeed, "we are quite sure that the policies Congress sought to advance by enacting [section 2252(a)] can be effectuated even" after we read a mental state element of recklessness into the statute. *Regan*, 468 U.S. at 653, 104 S.Ct. at 3269.

We must be chary of striking down an Act of Congress, particularly one that promotes interests as vital as protecting children from sexual exploitation. We have already saved section 2252(a)'s companion statute from unconstitutionality by correcting a very similar defect. *Kantor*, 858 F.2d at 542-44. I see no impediment to saving the statute once again; in fact, the second time around should be easier than the first.

CONCLUSION

After *Osborne*, it's settled that recklessness is a sufficient level of scienter under the First Amendment in a child pornography case; accordingly, I dissent from Part II(B) of the majority opinion which announces a knowledge requirement. Building on

this distinct starting point with respect to mental state, I also disagree with Part II(A), which holds that our prior decisions preclude reading a recklessness requirement into section 2252. I join the other parts of the opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-295 KN

UNITED STATES OF AMERICA, PLAINTIFF

v.

RUBIN GOTTESMAN, INDIVIDUALLY AND DBA AS R.G. SALES COMPANY, X-CITEMENT VIDEO, INC., DEFENDANTS

[Filed June 2, 1990]

ORDER RE CONSTITUTIONALITY OF 18 U.S.C. § 2252

The Court having received and considered the briefing supplied by both parties on the issue of whether 18 U.S.C. § 2252 is unconstitutional in light of *United States v. Thomas*, No. 88-5325 (9th Cir. Jan. 10, 1990), and having reopen [*sic*] the case specifically for this purpose HEREBY FINDS the statute constitutional.

Section 2252(a) provides:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252. In *Thomas*, the Ninth Circuit held that in subsection (1) "'knowingly' modifies only 'transports or ships,'" and "[i]n subsection (2) 'knowingly' modifies only 'receives'." *Thomas*, slip. op. at 307. This section "does not require that a defendant know that the material transported, mailed and received involved a minor." *Id.*

In *Thomas*, the government charged defendant with violations of 18 U.S.C. § 2251 and 2252. Each count concerned the same 13-year-old girl used by defendant to make a pornographic film which he then transported and received, in violation of 2252. The trial court in *Thomas* required the government to prove the defendant's knowledge of the victim's minority as part of its case-in-chief. The trial court instructed the jury that it must find scienter as to the victim's minority both as to the Section 2251 count and as to the Section 2252 counts.

Following the conviction of Mr. Thomas, the Ninth Circuit held in another case that the government was not required to prove the defendant's knowledge of the child's minority in a Section 2251(a) prosecution.

United States v. United States District Court, 858 F.2d 534, 538 (9th Cir. 1988). However, First Amendment concerns prompted a majority of the panel to add a good faith defense to the statute. *Id.* The Ninth Circuit, in *Thomas,* held that government had proved more than was required under the statute and that Section 2252 simply did not mandate proof that Thomas knew that the victim was a minor. *Thomas,* slip op. at 306. As the court stated:

> The section ... does not require that Thomas knew that the pornography he transported, mailed, and received involved a minor. The section requires only that Thomas knowingly transported and received the material. Cf. *United States v. United States Dist. Court for the Central District of Cal.,* 858 F.2d 534, 537-38 (9th Cir. 1988) (section 2251(a)'s wording and legislative history makes clear that it does not require knowledge of the child's age).

Id. at 307. The court in *Thomas* did not consider, or express any opinion as to whether § 2252 is unconstitutional for not requiring knowledge of the minor's age as an element of the offense.

A. *Constitutionality of Section 2252*

Defendants maintains [*sic*] that the holding in *Thomas* should change this Court's findings with respect to the constitutionality of § 2252. Without a scienter requirement, defendants assert, the statute violates the First Amendment.

(1) History of the Statute

The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2251, *et seq.* ("the

Act"), was enacted in response to concern with the overall chain of commercial child pornography. Originally, the Act proscribed the transportation of child pornography "for the purpose of sale or distribution for sale." This has been construed broadly and includes any future plan or scheme of the commercial pornographer to sell or to distribute the obscene prints for sale. *United States v. Langford,* 688 F.2d 1088, 1095 (7th Cir.), *cert. denied* 461 U.S. 959 (1982).

Congress amended the Act in 1984 after finding that child pornography had developed into a highly organized multi-million dollar industry which operates on a nationwide scale exploiting thousands of children. P.L. 98-292 § 2, 98 Stat. 204. The amended Act deleted the language which required that the child pornography be transported for the purpose of "sale or distribution of sale" in order to broaden the scope of the statute, and no longer required that the visual depiction be obscene but merely that it involve the use of a minor engaged in sexually explicit conduct. 18 U.S.C. § 2252(a).

(2) Overbreadth and Vagueness

As the Supreme Court held in *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973), to find a conduct-regulating statute, such as § 2252, unconstitutionally overbroad, its overbreadth must be "substantial" when judged in relation to its legitimate sweep. *See United States v. Tolczeki,* 614 F. Supp. 1424, 1429-30 (N.D. Ohio 1985) (upholding validity of § 2252(a) after concluding statute not overbroad restriction of First Amendment rights); *United States v. Anderson,* 610 F. Supp. 246, 249 (N.D. Ind. 1985) (finding language of § 2252 not unconstitutionally overbroad).

Moreover, courts have held that § 2252(a) was sufficiently specific and definite to give fair notice to potential offenders in that it did not cause persons of common intelligence to guess as its meaning and differ as to its application. *Tolczeki,* 614 F. Supp. at 1425. We agree and find that § 2252(a) does give adequate notice to those who are subject to it and cannot, therefore, be found void for vagueness. Even if this Court were to find vagueness in the language, as the Ninth Circuit held in *United States v. Fogarty,* 663 F.2d 928, 929 (9th Cir. 1981), 18 U.S.C. § 2253 defines the terms of § 2252 and would cure any vagueness in § 2252.

(3) Lack of Mens Rea Requirement

Despite the statute's lack of a mens rea requirement, criminal intent to violate the law, its constitutionality has been upheld. As the court in *Tolczeki,* 614 F. Supp. at 1429 found, Congress specifically omitted a mens rea requirement for conviction under the statute in order to establish a per se rule making it illegal for persons to knowingly transport, ship, receive or distribute in interstate or foreign commerce, or mail, or reproduce for distribution in interstate or foreign commerce or through the mail the prohibited material involving sexual exploitation of minors. *Id.*

(4) The Knowledge Requirement

In *United States v. Merchant,* 803 F.2d 174, 177 (5th Cir. 1986), the court finding the evidence sufficient to support a determination that defendant intended to and knowingly received child pornography stated as follows:

> Because we draw all inferences in favor of the government, the fact of receipt by itself *might* be sufficient to infer, beyond a reasonable doubt, that the receiver knows what he obtains. There can, it is true, be possession or receipt of objectionable material in ways that perfume the contents possessed or received. When the receipt occurs at the invention or with the consent of the possessor, it is more difficult to camouflage the fulsome scent of forbidden knowledge. Here, there is a veritable sty full of facts and inferences from which to detect the fragrance of scienter.

Id. While this Court in its findings grappled with the same issue of implied scienter as did the Fifth Circuit in *Merchant,* the Court finds it appropriate to modify its findings in light of *Thomas.* Assuming the statute has no scienter requirement as to the minor's age, either express or implied, the Court upon careful consideration of the evidence in this case, finds that § 2252 is still constitutional both on its face and as applied to these defendants.

The government met its burden under the statute when it proved that defendant had knowledge of the "character and contents" of the material and that Mr. Gottesman was not a mere delivery person with no idea whether the package contained books or widgets.

The Court modifies its findings in light of *Thomas* to the extent that this Court found in Conclusions of Law ¶ 2, that § 2252 "implies a scienter requirement" and that the Government "was required to prove and did prove scienter by showing that defendants knew that the person depicted in the videotapes was under 18 years of age." The findings should properly state:

2. 18 U.S.C. § 2252(a) is not unconstitutionally overbroad or void for vagueness. The Court finds that the Ninth Circuit's determination in *United States v. Thomas,* No. 88-5325 slip op. 299 (9th Cir. Jan. 10, 1990), that § 2252 requires no knowledge of the minor's age does not impermissibly chill the distribution of constitutionally protected material. Moreover, the Court finds the statute sufficiently specific and definite to give fair notice to potential offenders so as not to be deemed void for vagueness. In this case, the Government has provided more than sufficient evidence of knowing receipt of sexually explicit materials.

The Court, in light of *Thomas,* feels it is appropriate to delete Conclusion of Law ¶ 4 and replace it with the following:

4. Defendants have failed to demonstrate that the statute's potential illegitimate sweep far exceeds its legitimate application.

To the extent that these amended conclusions of law may be deemed findings of fact they are incorporated by reference.

IT IS SO ORDERED

DATED: June 29, 1990

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CR 88-295 KN

UNITED STATES OF AMERICA, PLAINTIFF

v.

RUBIN GOTTESMAN, INDIVIDUALLY AND DOING BUSINESS AS R.G. SALES COMPANY, STEVEN ORENSTEIN, AND X-CITEMENT VIDEO, INC., DEFENDANTS

[Filed Sept. 20, 1989]

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE COUNTS 9, 10 AND 11

The Court, having received and considered the evidence presented, having heard the testimony of witnesses and the arguments of counsel, HEREBY RENDERS the following Findings of Fact Re Counts 9, 10, and 11 of the indictment.

I. INTRODUCTION

Pursuant to Federal Rule of Criminal Procedure 23, this case was tried without a jury. Defendants formally waived the jury with the consent of the Government and the approval of the Court. The case was submitted to the Court for a verdict. The Court found all defendants guilty of Counts 9, 10 and 11 of the indictment.

II. FINDINGS OF FACT

1. In Count 9 of the indictment, the Grand Jury charged that on certain dates defendants Rubin Gottesman, X-Citement Video, Inc. and R.G. Sales Company conspired to knowingly distribute visual depictions that had been and were shipped in interstate commerce, which contained a minor engaged in "sexually explicit conduct," as defined in 18 U.S.C. § 2252(a)(2). The indictment alleges that such depictions violated that section.

2. Count 10 of the indictment alleges that on or about February 6, 1987, the defendants, Rubin Gottesman and X-Citement Video, Inc., did unlawfully and knowingly distribute visual depictions that had been transported in interstate commerce, with such visual depictions involving the use of Traci Lords, a female minor, engaging in sexually explicit conduct in the video tapes entitled, "Traci Lords;" and "Lust in the Fast Lane." The indictment further alleges that such actions were in contravention of 18 U.S.C. § 2252.

3. Count 11 of the indictment alleges that on or about April 30, 1987, defendants Rubin Gottesman, X-Citement Video, Inc., and R.G. Sales Company, did unlawfully and knowingly distribute visual depictions that had been transported in interstate commerce, with such visual depictions involving the use of a minor, Traci Lords, engaging in sexually explicit conduct. The videotapes are entitled: "Sex Shoot"; "Aroused"; "Sweet Little Things"; "Harlequin Affair"; "Screaming Desire"; "Joys of Erotica Series 114"; and "Pleasure of Productions Volume 10." The indictment further alleges that such actions violated 18 U.S.C. § 2252.

4. Traci Lords was under age at the time she made the following films: "Traci Lords"; "Lust in the Fast Lane"; "Sex Shoot"; "Aroused"; "Sweet Little Things"; "Harlequin Affair"; "Screaming Desire"; and "Joys of Erotica Series 114"; "Pleasure Productions Volume 10."

5. Traci Lords engaged in at least one sexually explicit act, as the term is defined in 18 U.S.C. § 2256, in each of the above-named films.

6. Defendants received several videotapes featuring Traci Lords from a source in Texas. The tapes contained visual depictions of a minor engaging in sexually explicit conduct.

7. Defendants knew that Traci Lords was under age when she made the films defendant's transported or shipped in interstate commerce.

8. Defendants maintained these videotapes in the inventory of X-Citement Video, Inc.

9. The videotapes were distributed and sold by defendants.

10. Defendants shipped the videotapes featuring Traci Lords, through interstate commerce, to Hawaii. On April 28, 1987, Steven Takeshita, an undercover police officer of the Los Angeles Police Department, purchased seven tapes featuring Traci Lords from the defendants for $200.00. These tapes were subsequently shipped to Hawaii and received by the Federal Bureau of Investigation in Hawaii on or about April 30, 1987. These actions were in violation of 18 U.S.C. § 371.

11. Defendants Rubin Gottesman and X-Citement Video, Inc. knowingly sold video cassette tapes entitled "Traci Lords" and "Lust in the Fast Lane" to undercover officer Steven Takeshita on or about February 6, 1987.

12. The videotapes sold to the undercover police officer had previously been transported in interstate commerce from Texas.

13. Defendants Rubin Gottesman, X-Citement Video, Inc. and R.G. Sales Company knowingly sold video cassette tapes to police officer Takeshita on or about April 28, 1987. The video cassette tapes sold are entitled: "Sex Shoot"; "Aroused"; "Sweet Little Things"; "Harlequin Affair"; "Screaming Desire"; "Joys of Erotica Series 114"; and "Pleasure Productions Volume 10."

14. After the sale of the above-mentioned video cassette tapes, defendants shipped said tapes to Hawaii. The tapes arrived in Hawaii on or about April 30, 1987.

III. CONCLUSIONS OF LAW

1. The Child Pornography Act, 18 U.S.C. § 2252 provides in pertinent part:

> (a) any person who—
>
> (1) Knowingly transports or ships in interstate . . . commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual or print medium depicts such conduct . . . shall be punished as provided in subsection b of this section.

18 U.S.C. § 2252.

2. The Court finds, as it did in denying pre-trial motions on this issue, that 18 U.S.C. § 2252 is constitutional; that the statute does imply a scienter requirement; and that the Government was required to prove and did prove scienter by showing that defendants knew that the person depicted in the videotapes was under 18 years of age.

3. It is axiomatic that to know the nature and character of child pornography, almost by definition, one must know that it depicts children. *United States v. Shetin*, 86 CR-480, slip op. at 21-22 (S.D.N.Y. 1987).

4. In *United States v. United States District Court for the Central District of California, Los Angeles*, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held that 18 U.S.C. § 2251(a) which prohibits the production of materials depicting a minor engaged in sexually explicit conduct does not require knowledge of the minor's age. The court distinguished the scienter requirement for producers under § 2251, "who are in a position to know or learn the ages of their employees," from that for distributors, "from those who merely handle the visual images after they are fixed on paper, celluloid or magnetic tape." *Id.* at 543-44 n.5. "While it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of actors with whom they had no direct contact. . . , producers are in a position to know or learn the ages of their employees" *Id.* at 544.

5. The Government has proved beyond a reasonable doubt that defendants knew that Traci Lords was under age when she made the films defendants transported or shipped in interstate commerce.

6. The Government has proved beyond a reasonable doubt that Traci Lords was in fact underage when she made the films introduced into evidence.

To the extent that the preceding Conclusions of Law may be deemed to be Findings of Fact, they are hereby incorporated by reference into the Findings of Fact.

IT IS SO ORDERED.

DATED: September 20, 1989

/s/ David V. Kenyon
DAVID V. KENYON
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA Nos. 89-50556 and 89-50562
DC Nos. CR-88-0295-KN-3 and CR-88-0295-KN-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

X-CITEMENT VIDEO, INC., DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RUBIN GOTTESMAN, DEFENDANT-APPELLANT

[Filed July 9, 1993]

BEFORE: CANBY, KOZINSKI and FERNANDEZ, Circuit Judges

ORDER

A majority of the panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc. Judge Kozinski would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has voted upon the suggestion for rehearing en banc and the suggestion for rehearing en banc has failed.

Accordingly, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

At the time of the acts alleged in the indictment, Chapter 10 of Title 18 provided in pertinent part, as follows:

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in,,[1] or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

[1] So in original.

(c)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce or mailed; or

(B) such notice or advertisement is transported in interstate or foreign commerce or mailed.

(d) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

* * * * *

§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape.

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No. 93-723

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

X-CITEMENT VIDEO, INC.;
and RUBIN GOTTESMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STANLEY FLEISHMAN
Counsel of Record
BARRY A. FISHER
DAVID GROSZ
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED.

Whether the Court of Appeals correctly held that 18 U.S.C. § 2252 – which makes punishable a person who "knowingly transports or ships" or who "knowingly receives, or distributes" a visual depiction, "if" the depiction is of a minor engaging in sexually explicit conduct – violates the First Amendment because the statutory language unambiguously imposes no scienter of age requirement, and the legislative history reveals that Congress clearly and deliberately declined to impose any such scienter requirement.

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Respondents Rubin Gottesman and X-Citement Video, Inc., respectfully submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT.

In 1986 and 1987, an undercover police officer, posing as a retailer of adult videotapes, contacted Gottesman, the operator of X-Citement Video, Inc., a wholesaler, and expressed interest in buying videotapes featuring Traci Lords. Gottesman eventually sold two sets of such tapes: the first was a box of 49 tapes that he sold directly to the police officer; the second was a box of eight tapes that Gottesman sold to the police officer and sent (in accordance with the police officer's instructions) to Hawaii.

Ms. Lords was a popular "adult" entertainer who had appeared in mass-market magazines like Penthouse, as well as in videotapes. She was over 16 years of age when she made the tapes, which were marketed as "adult" entertainment, not as "kiddie porn." The Government never claimed that the tapes were obscene.[1]

A federal grand jury indicted respondents for distributing, shipping, and conspiring to distribute and ship child pornography in violation of 18 U.S.C. § 2252. Respondents moved to dismiss the indictment, on the grounds, inter alia, that section 2252 violates the First Amendment because it does not contain any scienter

[1] Because the Court of Appeals concluded that § 2252 is unconstitutional on its face, it did not reach respondents' argument about the statute as applied. Pet. 4a-5a.

requirement as to age, and that the indictment is constitutionally invalid because it did not allege that respondents knew the person depicted in the tapes was under 18 years of age.[2] The District Court denied the motion to dismiss, asserting that section 2252 implies a scienter requirement and that the statute and the indictment required the Government to prove that respondents knew that the person depicted in the videotapes was under 18 years of age. Pet. 40a-41a. The District Court asserted that such a requirement was constitutionally required because the distribution of books and films would undoubtedly be chilled "if sellers were burdened with learning not only the contents of all of the materials they carried, but also the ages of actors with whom they had no direct contact." Pet. 41a.

Following a bench trial, respondents were convicted; the district court sentenced Gottesman to 12 months' incarceration and X-Citement Video, Inc., to payment of a $100,000 fine. After respondents filed a notice of appeal, they requested and obtained a remand to the District Court for reconsideration of the judgment in light of *United States v. Thomas*, 893 F.2d 1066, *cert. denied*, 498 U.S. 826 (1990), which had held that section 2252 does not contain a scienter requirement as to age. On remand, the District Court adhered to its conclusion that the statute is constitutional notwithstanding the fact that it lacks a mens rea requirement. Pet. 34a.

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[2] In light of its ruling on the constitutionality of the statute, the Court of Appeals did not address respondents' argument that the indictment was invalid. Pet. 4a n.6.

The Court of Appeals reversed, holding that section 2252 does not include a scienter requirement regarding the minority of the performers and that it therefore violates the First Amendment. The court explained that section 2252 "potentially applies to all kinds of recipients or distributors of video tapes and magazines," and "[t]o render them all prima facie criminals if one of the performers in a portrayal of sexually explicit conduct is underage, without the distributors or recipients knowledge, would be to create precisely the kind of chilling affect condemned by *Smith [v. California*, 361 U.S. 147 (1959)]." Pet. 15a. Finally, the court concluded that it could not construe section 2252 so as to save its constitutionality because to do so comes too close to "judicial rewriting of a statute." Pet. 16a.

Judge Kozinski dissented in part. He agreed that the word "knowingly" in section 2252 does not apply to the age of the depicted person, Pet. 23a, and that the statute "must contain a *mens rea* requirement," Pet. 17a. He believed, however, that it was the court's duty to read a scienter requirement into the statute to render it constitutional, Pet. 27a, even if "its drafters plainly had not meant to put it there," Pet. 24a n.6.

THE HISTORY OF THE STATUTE.

In 1977 Congress enacted the Protection of Children Against Sexual Exploitation Act. On its face the word "knowingly" in section 2252 did not apply to the age of the depicted person, and the legislative history showed that Congress clearly and deliberately imposed no such

scienter requirement. *United States v. United States District Court*, 858 F.2d 534, 537, 538 (9th Cir. 1988) (*District Court*) ("This omission was quite clearly deliberate . . . . There is . . . little doubt that knowledge of the minor's age is not necessary for conviction under" the Act.).[3]

New York v. Ferber, 458 U.S. 747 (1982), moved Congress to amend the Act in 1984. Before the amendment, the Act had been construed as not requiring knowledge of the age of the person depicted. *See United States v. Langford*, 668 F.2d 1088, 1089 n.1 (7th Cir.), *cert. denied*, 461 U.S. 959 (1982). The amended Act deleted language that required that the visual depictions be transported for the purpose of sale or distribution for sale, and that the visual depiction be obscene. The amendment also raised the age limit of the person depicted from 16 to 18. The amendment, however, made no change concerning the word "knowingly."

Prior to the case at bar, the Government consistently took the position that the Act does not have a scienter element as to the minority status of the person depicted. Thus, in *United States v. Kleiner*, 663 F. Supp. 43 (S.D. Fla. 1987), the court stated that it agreed "with the government that the knowledge requirement under 18 U.S.C. § 2252 is not, as the defendants argue, whether the tape . . . was made using minors, but rather it is only the shipment or transportation of the sexually explicit material which must be knowing." *Id.* at 44. The knowledge

[3] *District Court* involved § 2251 of the Act, which deals with a person who produces the material, while § 2252 deals with a person who transports or receives the material. The legislative history applies to both sections equally.

element, the court stated, "does not concern the age of the [person]." *Id.*

In *United States v. Tolczeki*, 614 F. Supp. 1424 (N.D. Ohio 1985), the Government again argued that knowledge of the age of the persons depicted is not an element of the offense. The court agreed, stating that a clear reading of section 2252 "indicates that Congress specifically omitted a *mens rea* requirement for conviction under the statute in order to establish a *per se* rule making it illegal for persons to knowingly transport . . . in interstate . . . commerce . . . the prohibited materials involving sexual exploitation of minors." *Id.* at 1429.

REASONS FOR DENYING THE PETITION.

1. The Court of Appeals properly held that section 2252 does not contain a scienter requirement as to age, and is therefore unconstitutional.

a. It was common ground on the court below that the word "knowingly" in the statute does not apply to the minority of the person depicted. As the court noted, " 'In subsection 1, "knowingly" modifies only "transports or ships." In subsection 2, "knowingly" modifies only "receives." ' " Pet. 10a (quoting *Thomas*, 893 F.2d at 1070). *See also* Pet. 23a-24a (Kozinski, J., dissenting in part) ("All *Thomas* tells us is that the word 'knowingly' in the statute does not apply to the age of the depicted children. T' s is not much more than we would learn by reading the statute ourselves.")

The Government virtually concedes this result, stating that the Ninth Circuit's reading of the Act "may be correct grammatically." Pet. 8. The Government argues, however, that the legislative history supports its argument that the word "knowingly" requires knowledge that the person depicted is under 18 years of age. Where, however, as here, "the statutory language is unambiguous," a construction at variance from that language is unwarranted at least in the absence of " 'clearly expressed legislative intent to the contrary.' " *National Org. for Women v. Scheidler*, No. 92-780 (U.S. Jan. 24, 1994) (quoting *Reves v. Ernst & Young*, 507 U.S. ___, ___, 113 S. Ct. 1163, 1169 (1993)).

Here, the legislative history, discussed at length in *District Court*, 858 F.2d at 538, is *consonant* with the statute's plain language. The history reveals that "[t]he defendant's awareness of the subject's minority is not an element of the offense." *Id.* The government's reliance on the colloquy of two senators to support its contention, Pet. 8-9, has little, if any, value. Certainly it has less value than the committee reports of both Houses of Congress, discussed in *District Court*, 858 F.2d at 538. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) ("Committee reports are 'more authoritative' than comments from the floor . . . . ").

The court below considered the possibility of reading a scienter of age requirement into the statute to save its constitutionality, but concluded that this would amount to an impermissible rewriting of the statute. Pet. 16a. *See Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) ("It must be remembered that although this Court will often strain to construe legislation so as to save it against

constitutional attack, it must not and will not carry this to the point of . . . judicially rewriting it. . . . "); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("It is for Congress, not this Court, to rewrite the statute.").

b. The Ninth Circuit's holding is in accord with the decisions of the Court. In *Ferber*, the Court stated that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant," 458 U.S. at 765, and added "that the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial," *id.* at 773.[4]

Since the Act applies to everyone who sends or receives magazines, videotapes or other illustrated works – activities that an ordinary person would engage in innocently – the Ninth Circuit concluded that to expose so many persons to criminal exposure "if one of the performers in a portrayal of sexually explicit conduct is under age, without the distributor's or recipient's knowledge," would violate "the First Amendment as the Supreme Court has interpreted it." Pet. 15a. This is so because the age of the person depicted defines the boundary between speech that is constitutionally protected and speech that is not: absent a knowledge of age requirement, the Act imposes liability without fault. The Ninth Circuit carefully explained that the question it was deciding "does not concern the defendant's knowledge of

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[4] The Act imposes very severe penalties and the stigma attached to a conviction is extreme. *See United States v. Moore*, 916 F.2d 1131, 1139 (9th Cir. 1990) ("Of all the crimes known to our society, perhaps none is more revolting . . . . ").

the law; it concerns his knowledge of a particular fact – the underage of the performer." Pet. 14a.

The Government virtually concedes that the Act without a scienter of age requirement would violate the First Amendment. At oral argument in the Ninth Circuit, the Government "conceded that the statute would have severe constitutional problems if it did not include a requirement of knowledge that at least one performer engaged in the specified sexually explicit acts was under 18 years of age." Pet. 13a. For that reason, it is now the Government's view that the word "knowingly" in subsections (a)(1) and (a)(2) "requires knowledge that the item transported, shipped, received or distributed, is a depiction of a minor engaging in sexually explicit conduct." Pet. 7.

Alternatively, the Government argues that, assuming the word "knowingly" does not impose a scienter as to age requirement, "it does not follow that the statute defines a strict liability offense in that regard." Pet. 9. This is so, according to the Government, because some courts have held that the Act requires proof that defendants had knowledge of the contents of the material shipped or received. Pet. 11-13. The Court of Appeals correctly characterized this argument as "a bit cagey," Pet. 9a, and "skat[ing] a very fine line," Pet. 13a, because the Government confuses knowledge of contents of a work with knowledge that a person depicted therein is under 18 years of age.

2. As the Government acknowledges, "[n]o other court of appeals has had occasion to consider whether Section 2252 is unconstitutional on the ground that it fails

to require proof that the defendant knew that the person depicted engaging in sexually explicit acts is a minor." Pet. 11 (footnote omitted).

3. There are no prudential reasons to grant certiorari in this case. Indeed, this is not a true child pornography case. The Traci Lords tapes were the subject in *District Court*, and the court there observed that "[c]ases like this one, where the actors allegedly engage in a deliberate and successful effort to deceive the entire industry, are likely to be exceedingly rare." 858 F.2d at 543. The Court should not use this unique case to address the question raised herein. If a conflict should develop between the Ninth Circuit and another court of appeals, it will then be time enough for the Court to consider the question of which the Government now seeks review.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FLEISHMAN, FISHER & MOEST
STANLEY FLEISHMAN
Counsel of Record
BARRY A. FISHER
DAVID GROSZ
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077

Counsel for Respondents

February 2, 1994

(5)

No. 93-723

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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC. AND RUBIN GOTTESMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-723

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC. AND RUBIN GOTTESMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

1. In our petition, we explained why the Ninth Circuit's premise for holding Section 2252(a)(1) unconstitutional—that the statute does not require proof of the defendant's knowledge that the materials at issue show minors engaged in sexually explicit acts—is incorrect. We found strong support for our position that the statute requires proof of such knowledge in the pertinent legislative history. Pet. 8-11. Respondents take issue with our reading of the legislative history, citing the Ninth Circuit's earlier decision in *United States* v. *United States District Court*, 858 F.2d 534, 538 (1988), for the proposition that "[t]he history reveals that '[t]he defendant's awareness of the subject's minority is not an element of the offense.'" Br. in Opp. 6. *District Court*, however, did not address the proper construction of the

knowledge requirement of Section 2252(a); rather, it addressed the question whether knowledge of the minority of the subject of the depiction is an element of a wholly different provision—18 U.S.C. 2251(a).

As we discussed in our petition (Pet. 9 n.3), the legislative history of Section 2251(a), which proscribes the production of child pornography, shows that Congress deliberately omitted the word "knowingly" from that statute in order to ensure that knowledge of the minority of the subject would not be considered an element of the offense. See S. Rep. No. 601, 95th Cong. 1st Sess. 5 (1977); H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977). By contrast, Section 2252, which was enacted as part of the same legislation as Section 2251, does contain the word "knowingly." It follows that Congress must have intended to include such a knowledge requirement in Section 2252.

2. Since we filed our petition, the Third Circuit has addressed the precise issue presented here and has resolved the issue in a manner that squarely conflicts with the decision in this case. In *United States* v. *Cochran*, No. 93-1578 (Feb. 2, 1994), that court concluded that "Congress intended [the word] knowingly as employed in [Section 2252] to require proof that the defendant knew the nature of the materials to be child pornography." Slip op. 10. Based on that conclusion, the court upheld the constitutionality of the statute. Accordingly, there now exists a clear-cut conflict in the circuits on the question whether Section 2252 is unconstitutional on the ground that it omits to require proof that the defendant knew that he was dealing in child pornography.

For the foregoing reasons and the reasons stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1994

MOTION FILED
DEC - 6 1993

No. 93–723

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

X–CITEMENT VIDEO INC.,
AND RUBIN GOTTESMAN,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL FAMILY LEGAL FOUNDATION AND AMERICAN FAMILY ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

*LEN L. MUNSIL
JAMES P. MUELLER
5353 N. 16th Street, Suite 400
Phoenix, Arizona 85016
(602) 265–1513

*Counsel of Record
Amici Curiae

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Amici respectfully move this Court for leave to file a brief amici curiae in support of the petition for writ of certiorari. The petitioner has consented in writing to our filing this brief (see Appendix A), but counsel for respondent did not respond to our written and telephonic requests for consent.

Amici each have a long-standing interest in and commitment to the governmental effort to eliminate child pornography, and have specific expertise in this area of law (see Interest of the Amici Curiae, *supra*). These organizations have more than a million supporters who are concerned about the effort to protect our children from sexual exploitation. Further, amici's legal interpretation of the statute at issue is not represented by either party, and so will provide a unique perspective to the Court.

For all these reasons, amici request that this Court grant our motion for leave to file a brief amici curiae.

Respectfully submitted,

LEN L. MUNSIL
5353 N. 16th Street
Suite 400
Phoenix, Arizona 85016
(602) 265-1513

INTEREST OF THE AMICI CURIAE

National Family Legal Foundation (NFLF) is a nonprofit, public interest corporation that seeks to preserve the integrity of families and the innocence of children by promoting a healthy and safe environment, free from illegal pornography and the sexual crimes which invariably accompany its widespread distribution. NFLF provides free legal assistance to prosecutors enforcing child pornography and obscenity laws, and helps draft laws and ordinances for concerned public officials to help lessen the negative influence of pornography on society.

NFLF has appeared as amicus curiae before this Court in every child pornography and obscenity case since NFLF's inception in 1990, including the recent child pornography case of *United States v. Knox*. NFLF board members Edwin Meese, former Attorney General of the United States, and Alan Sears, former executive director of the Attorney General's Commission on Pornography, have

a longstanding commitment to aggressive enforcement of federal child pornography laws. NFLF is supported by citizens in all 50 states.

Amici American Family Association (AFA) is a nonprofit organization incorporated in 1977 under the name National Federation for Decency. AFA coordinates citizen and church participation to promote traditional American values and apply the Biblical ethic in society. AFA has supporters in all 50 states, including more than 600 chapters of local citizens who actively seek to preserve community integrity through enforcement of child pornography and obscenity laws. About one million individuals and churches subscribe to its montnly newsletter, *AFA Journal*.

INTRODUCTION

Protecting children from sexual exploitation is a governmental interest of surpassing importance. The statute at issue, 18 U.S.C. § 2252, has been employed successfully by federal prosecutors for more than 15 years to prosecute those who traffic in child pornography. The statute has withstood numerous court challenges. But if the Ninth Circuit's decision is correct, § 2252 has suffered all this time from a fatal constitutional defect that no other court was able to discover. We believe strongly that the court of appeals failed to accord Congress the deference it is due by refusing to construe this vital statute in a constitutional manner. The decision of the court of appeals conflicts with decisions of this Court and other federal courts, and most importantly, will cripple the important federal effort to eliminate child pornography. This Court should therefore grant certiorari and reverse the court of appeals.

ARGUMENT

Federal statutes prohibiting the sexual exploitation of children through the production of pornography — as distinct from federal prohibitions on the distribution of obscene materials generally -- are of relatively recent origin. They reflect a concern that "[e]ach year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit." H.Rep.No. 536, 98th Cong., 1st Sess., (Nov. 10, 1983), reprinted in 1984 U.S. Code Cong. & Admin. News, 492.

Congress recognized that the distribution and receipt of child pornography contributes to further incidents of child abuse:

> [M]any pedophiles -- those whose sexual preference is for children -- prefer to purchase [child pornography] through mail order catalogues. This is because often these catalogues permit the pedophile to order materials depicting specific sexual deviations, to establish

> contact with other pedophiles, and even to establish liaisons with some of the child models.

S.Rep.No. 438, 95th Cong., 2d Sess., at 5 (1977), reprinted in 1978 U.S. Code Cong. and Admin. News, 43.

This Court recognized the substantial governmental interest in protecting children from the evils of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982). In an opinion by Justice White, the Court upheld a New York statute which prohibited the distribution of materials which depict children engaging in sexually explicit conduct whether or not such depictions are "obscene".

First, the Court found that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" and the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 756-57, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607

(1982). Further, the Court went on to say:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 759 (footnote omitted). The Court concluded, because of the compelling state interests involved, that child pornography, even though not obscene, was not protected by the First Amendment.

Finally, in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court approved a law prohibiting the possession of child pornography, even in one's own home. In upholding the statute, this Court further addressed the impact of this vile crime:

> Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain...[E]ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

The victimization of children through child pornography has been aided by two recent developments, one in technology and one in the law. First, advancements in computer technology and graphics have made it possible for pedophiles to instantaneously reproduce and distribute child pornography on a national and international basis through computer modems. Second, the Justice Department's recent reinterpretation of the definition of child pornography in the case of *United States v. Knox*, No. 92-1183, *cert. granted* 113 S.Ct. 2926 (June 7, 1993), *vacated and remanded*, ___ U.S. ___, 62 U.S.L.W. 3318 (Nov. 1, 1993), has opened the door -- if the courts go along -- to legalization of a whole category of child

pornography that was previously prosecutable. In that case, Congress specifically repudiated the Justice Department's new interpretation by a 100–0 Senate vote, but only after this Court remanded the case to be reconsidered in light of the Justice Department's new, weaker standard.

Given the strength of the government's interest in protecting children from sexual exploitation, and given the traditional reluctance of the judiciary to strike down an act of Congress as unconstitutional on its face, the court of appeals erred by failing to construct § 2252 in a constitutional manner. This crippling of the battle against child pornography can only be corrected if this Court grants certiorari and reverses the court of appeals.

While the effect of the court of appeals' decision is to undercut the important federal effort to eliminate child pornography, as a matter of law the ruling conflicts with previous decisions of this Court and other courts. The court's conclusion that § 2252 contains no scienter

requirement and cannot be narrowed judicially is just plain wrong. As Judge Kozinsky pointed out in his dissent, the majority ignored this Court's discussion in *Osborne* of the minimum constitutional scienter requirement for a child pornography conviction. In that case, this Court held that recklessness is constitutionally sufficient to uphold a child pornography conviction. 495 U.S. at 115. Further, courts have an obligation to determine whether constitutionally narrowing an act of Congress will cure its defect before taking the extreme step of invalidating the statute. *Edward D. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *U.S. v. X-Citement Video*, 982 F.2d 1285, 1295, n.6 (9th Cir. 1992) (Judge Kozinsky, dissenting in part).

The court of appeals should have grafted a constitutional requirement of recklessness onto the statute, thus saving it from facial invalidity. We believe that recklessness standard would be met when, as the

government argued below, the defendant had knowledge of the character and nature of the material, *Hamling v. United States*, 418 U.S. 87, 123 (1974); not that it met the legal definition of child pornography, but rather that it was sexually explicit and that the "actors" and "actresses" appeared youthful. It "demeans the grand conception of the First Amendment", *Miller v. California*, 413 U.S. 15, 34 (1973), to continually use the noble protections for freedom of speech afforded by that historic provision to examine in microscopic fashion the validity of convictions for those engaged in "the sordid business of pandering." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 258 (1990) (Justice Scalia, concurring and dissenting), quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966).

Rubin Gottesman not only was involved in "the sordid business of pandering" sexually explicit and probably obscene material, but the government clearly proved in this

case that he had actual knowledge that he was distributing child pornography. United States' brief at 2–4. But it should be enough to sustain a conviction in this case, and in any subsequent child pornography case, for the government to prove that a defendant recklessly trafficked in sexually explicit material involving youthful–appearing participants. Any further scienter requirement would decriminalize much child pornography, because every trader in pedophilic material involving postpubescent children would successfully argue that he had no idea how old the "performers" were. The court of appeals' says that requiring knowledge that at least one performer was underage is only a requirement of knowledge of a particular fact, not a requirement that the defendant know the material's legal status, in violation of *Hamling*. *U.S. v. X–Citement Video*, 982 F.2d at 1291. But this is doublespeak; if you require actual knowledge that one performer is underage, you are requiring actual knowledge of the material's legal status, because by

definition it is then child pornography. *Hamling* made clear that knowledge of the material's legal status was not necessary. 418 U.S. at 123.

CONCLUSION

The bottom line is this: Rubin Gottesman makes his living skirting obscenity laws, and like most pornographers was only too happy to satisfy a request for child pornography when the price was right. To people who make their living through commercial exploitation of the flesh of young girls, whether those girls are 11 and 12 as they were in the *Knox* case, or 15 as in this case, or 18 and 19 as they are in most obscenity cases, doesn't make a whole lot of difference. And if they don't care who they abuse and degrade to make a profit, we shouldn't go out of our way to construct legal arguments to let them off the hook.

Affirming the constitutional validity of convictions for hard–core pornographers who recklessly disseminate sexual material involving children will never interfere with the legitimate free speech rights of the American people. But while federal judges and the Solicitor General's office

play fun and challenging intellectual law school games with statutory and constitutional interpretation, in this case and in *Knox*, the sexual abuse of real children for profit continues. This Court should not allow another roadblock to be thrown up in the effort to prosecute despicable criminals who make their living from the sexual abuse of children. For all the foregoing reasons, it is vital that this Court grant the government's petition for a writ of certiorari, reverse the court of appeals, and reinstate the convictions of Rubin Gottesman and his corporation, X-Citement Video.

Respectfully submitted,

LEN L. MUNSIL
JAMES P. MUELLER
5353 N. 16th Street
Suite 400
Phoenix, Arizona 85016
(602) 265-1513

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amici Curiae National Family Legal Foundation and American Family Association In Support Of The Petition For Writ Of Certiorari" have been sent by U.S. Mail, Postage Prepaid, on this 6th day of December, 1993 to:

Drew S. Days III, Solicitor General
William C. Bryson, Deputy Solicitor General
Christopher J. Wright, Assistant to the Solicitor General
U.S. Department of Justice
Office of the Solicitor General
10th & Constitution Avenue, NW
Washington, D.C. 20530

Stanley Fleishman
Fleishman, Fisher & Moest
2049 Centry Park East
Suite 3160
Los Angeles, California 90067

LEN L. MUNSIL

APPENDIX A

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

December 3, 1993

Lan L. Munsil
Executive Director and
General Counsel
National Family Legal Foundation
5353 North 16th Street
Suite 400
Phoenix, Arizona 85016

Re: United States v. X-Citement Video, No. 93-723

Dear Mr. Munsil:

This is in response to your letter of December 3, 1993.

On behalf of the United States I hereby consent to the filing of a brief as amicus curiae on behalf of the National Family Legal Foundation and Family Research Council in the above case.

Sincerely,

Drew S. Days, III

Drew S. Days, III
Solicitor General

Supreme Court, U.S.
FILED
DEC - 6 1993
OFFICE OF THE CLERK

NO. 93-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, *Petitioner,*

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, NATIONAL COALITION AGAINST PORNOGRAPHY, "ENOUGH IS ENOUGH!", ALLIANCE FOR THE RIGHTS OF CHILDREN, AMERICAN COALITION FOR ABUSE AWARENESS, CHILDHELP USA, CHILD WELFARE LEAGUE OF AMERICA, FAMILY RESEARCH COUNCIL, INC., FOCUS ON THE FAMILY, JUSTICE FOR CHILDREN, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, NATIONAL CENTER FOR REDRESS OF INCEST AND SEXUAL ABUSE, RELIGIOUS ALLIANCE AGAINST PORNOGRAPHY, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER.

H. ROBERT SHOWERS*
*(Counsel of Record)
National Law Center for Children and Families
3975 University Drive, Suite 320
Fairfax, Virginia 22030
(703) 691-4626

BEST AVAILABLE COPY

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Comes now the National Law Center for Children and Families ("NLC"), by and through Counsel, to move this Court to permit it to file a brief *amicus curiae*. In the instant controversy, the United States has filed a Petition for a Writ of Certiorari asking this Court to review and overturn a decision rendered by the United States Court of Appeals for the Ninth Circuit. *See United States v. X-Citement Video*, 982 F.2d 1285 (9th Cir. 1992). NLC seeks to file a brief *amicus curiae* in support of this Petition. Sup. Ct. R. 37.2 permits NLC to move this Court for leave to file a brief when a party has not consented to allow it to file.

Solicitor General Drew Days, who represents the government in the present case, has consented to NLC's filing of an *amicus curiae* brief. A copy of this consent has been filed with the clerk of this Court. Mr. Stanley Fleishman, Counsel for the Respondents, has not replied to NLC's request for consent. A copy of this request has also been filed with the clerk of this Court.

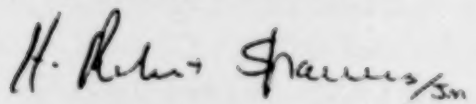
In the present case, NLC represents a diverse coalition of interest groups. *Amici Curiae* in this case represent virtually every segment of the American body politic. Each member of the coalition supporting the attached brief regards the disposition of the present Petition as crucial to the emotional and physical well-being of children.

Amici Curiae will bring to this Court's attention legal authority and argument in support of the Petition for a Writ of Certiorari not present in the Petition itself. The provision of such authority and argument will facilitate "the exercise of [this Court's] discretionary jurisdiction." Sup. Ct. R. 15.1. Thus, it is clear that the enclosed brief will be "of considerable help to the Court." Sup. Ct. R. 37.1.

In view of the foregoing, the National Law Center for Children and Families hereby moves this Court for

permission to file an *amicus curiae* brief in support of the Petitioner.

Respectfully submitted,



H. Robert Showers
Counsel of Record
National Law Center for
Children and Families
3975 University Drive, Suite 320
Fairfax, Virginia 22030
(703)-691-4626

COUNTERSTATEMENT OF QUESTION PRESENTED

In view of the government's compelling interest in eliminating child pornography, does the First Amendment require that federal laws proscribing the distribution of child pornography contain an element of scienter as to minority?

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INTEREST OF THE *AMICI CURIAE*

Amici comprise a broad collection of public interest groups whose membership include the survivors of childhood sexual abuse and professionals who expend considerable energy advocating legal and social reforms to protect children. *Amici*, while representing diverse political and religious perspectives, agree that this Court's decision regarding the Petition for Writ of Certiorari will directly affect the safety and well-being of children. For the Court's convenience, the Appendix contains a full description of the *Amici*.

SUMMARY OF REASONS FOR GRANTING THE PETITION

Contrary to the conclusion of the court below, constitutional precedent in no way requires that 18 U.S.C. § 2252 contain an element of scienter as to minority. This Court has previously held that constitutional precedent limiting the scope of laws proscribing obscenity exercise some degree of precedential force in the context of child pornography. With obscenity, this Court has held that the government may not impose strict criminal liability for distributing obscenity. Instead, the government must prove that a defendant accused of distributing obscenity had actual or constructive knowledge of the nature and character of the material at issue and of the act of distribution. Thus, precedent does not require that 18 U.S.C. § 2252 contain an element of scienter as to minority.

In the event that this Court should determine that scienter as to minority is constitutionally required, a careful analysis of precedent clearly reveals that constructive knowledge is sufficient. Moreover, precedent allows for proof of scienter through indirect or circumstantial evidence.

REASONS FOR GRANTING THE PETITION

I. 18 U.S.C. § 2252 Does Not Require that the Government Prove Scienter as to Minority in a Prosecution for Distributing Child Pornography.

A. Legislative History Clearly Reveals that Congress Did Not Intend to Include Scienter as to Minority as an Element of the Distribution Offense Defined by Section 2252.

While the ultimate holding of the court below is clearly incorrect, *Amici* agree that the defendant's knowledge of the minority of persons depicted in pornographic materials is not an element of the distribution offense defined in 18 U.S.C. § 2252. *See United States v. X-Citement Video*, 982 F.2d 1285, 1289 (9th Cir. 1992). The *X-Citement Video* court relied on the Ninth Circuit's prior ruling in *United States v. Thomas* that Section 2252 does not require that the government prove or allege scienter as to minority. 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990). This Court let that ruling stand undisturbed.

Amici contend that the legislative history of Section 2252 strongly supports the conclusion that scienter as to minority is not an element of a Section 2252 distribution offense. The history of Section 2252 reveals that Congress did not intend to require scienter as to minority. In 1984, Congress amended Section 2252 to accommodate this Court's decision in *Ferber v. New York*, which held that government has the power to proscribe non-obscene pornography containing children. 458 U.S. 747 (1982); *see* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984)("1984 Act"). The legislative history of the 1984 Act does not make reference to the knowledge element of Section 2252.

Thus, it is necessary to examine Congress' intent with respect to scienter in the original version of Section 2252. *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978)("1977 Act"). Congress' intent in the 1977 Act is clear. The conference committee indicated that they intended that Section 2252 would impose criminal liability on any person "who knowingly transport[s], ship[s], or mail[s] for the purpose of sale or distribution ... any such material." *See* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 95-811, 95th Cong., 1st Sess. (1977) *reprinted in* 1978 U.S.C.C.A.N. 69, 71. The Joint Explanatory Statement of the Committee of Conference does not indicate that a Section 2252 defendant must have knowledge that the proscribed material contains minors engaging in sexual activity.[1] Moreover, in a letter to the Senate Judiciary Committee, Assistant Attorney General Wald, now Judge Wald, correctly adduced that "the defendant's knowledge of the age of the child is not an element of the [Section 2252] offense." *See* S. Rep. No. 438, 95th Cong., 1st Sess. (1977) *reprinted in* 1978 U.S.C.C.A.N. 40, 64.

It is appropriate to presume that Congress' intent not to require knowledge as to minority in the original version of Section 2252 carried over into the 1984 Act, except where provisions of the 1984 Act expressly altered provisions of the 1977 Act. The 1984 Act is silent on the question of scienter.

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[1] The government cites an exchange between Senators Roth and Percy concerning the knowledge requirement of § 2252. Pet. for Cert. at 8-9. This exchange tends to indicate that Senator Roth believed that § 2252 required scienter as to minority. However, a statement by one senator during legislative debate is less instructive as to the intent of the entire Congress than the conference committee report. Statements made during floor debates attempt to garner support for legislation and reflect the views of the speaker. Statements of legislative intent contained in conference reports, issued by the committee that puts legislation in its final form, are infinitely more probative of the intent of Congress.

To conclude that Congress' intent with respect to scienter in the 1984 Act differs from and supersedes its intent in the 1977 Act is to conclude that Congress implicitly repealed a portion of Section 2252. The presumption of transferred legislative intent is necessary and applicable here because "repeals by implication are not favored." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 690 (1992)(quoting *Posadas v. National City Bank*, 246 U.S. 497, 503 (1936)).

In light of the legislative history of Section 2252, the court below correctly concluded that §2252 does not require the government to prove scienter as to minority.

B. The First Amendment Does Not Require the Government to Prove Scienter as to the Minority of Persons Depicted "Engaging in Sexual Conduct" in a Prosecution for Distributing Child Pornography under 18 U.S.C. § 2252.

i. *Ferber v. New York* and *Osborne v. Ohio* Do Not Require Proof of Scienter as to the Minority of Persons Depicted in Child Pornography.

On two occasions, this Court has addressed the constitutional propriety of proscriptions against child pornography. *Ferber v. New York*, 458 U.S. 747 (1982)(upholding federal statute proscribing distribution of child pornography); *Osborne v. Ohio*, 495 U.S. 103 (1990)(upholding state statute proscribing simple possession of child pornography). On neither occasion did this Court expansively discuss the level of scienter that the Constitution requires in the context of child pornography. *See Ferber* 458 U.S. at 765 (some scienter required); *Osborne*, 495 U.S. at 114 n.9 (holding that recklessness on the part of defendant accused of possessing child pornography is constitutionally sufficient showing of scienter). The present case poses the

question whether the Constitution mandates that 18 U.S.C. § 2252 include an element of scienter as to the minority of persons depicted in child pornography. An analysis of precedent reveals that the Constitution does not require that Section 2252 include such a scienter requirement.

As a threshold matter, it is clear that Section 2252 is not a "pure" strict liability crime. Rather, it requires the government to prove that a distributor of child pornography have knowledge that he is transporting material interstate. Consequently, 18 U.S.C. § 2252 does not violate the *Ferber* Court's admonition that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765.

Additionally, Section 2252 should be interpreted to require scienter as to the sexually explicit nature of the materials distributed. In *Hamling v. United States*, this Court concluded that it is constitutionally sufficient to prove only that the defendant in an obscenity prosecution knew of the nature and character of the material at issue. 418 U.S. 87, 119-24 (1974). That rationale is directly applicable here. *Cf. Ginsberg v. New York*, 390 U.S. 629, 643-44 (1968). As in *Hamling*, this Court should hold that Section 2252 requires a showing that defendants accused of distributing child pornography knew of the character of the material at issue.

By not requiring scienter as to minority, while at the same time requiring scienter as to the act of distribution and the nature and character of the material distributed, Section 2252 "put[s] pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals." Roscoe Pound, The Spirit of the Common Law 52 (1921)(discussing propriety of strict liability statutes); *see also* Oliver Wendell Holmes, The Common Law 75 (1881)(strict criminal liability is appropriate because it forces actors to "find out at his [sic.] own peril whether the other facts are present which would make the act criminal.") Compelling distributors of constitutionally protected

expressive material to avoid distributing unprotected sexually explicit speech is fully consistent with precedent. In *Hamling*, this Court observed:

> "The precise course of the line [which every criminal statute draws] may be uncertain, *but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.*"

418 U.S. at 124 (quoting *United States v. Wurzbach*, 280 U.S. 396 (1930))(emphasis added); *see also Roth v. United States*, 354 U.S. 476, 491-93 (1957). It is thus permissible for 18 U.S.C. § 2252 to impose liability on child pornography distributors in such a manner as will advance society's interest in protecting children.

ii. *Smith v. California* Does Not Require that 18 U.S.C. § 2252 Include an Element of Scienter as to Minority Because Imposing Strict Liability as to Minority Will Not Chill a Substantial Amount of Protected Speech.

Contrary to the assertion of the court below, *Smith v. California* does not require that Section 2252 include an element of scienter as to minority. 361 U.S. 147 (1959). Rather, *Smith* and its progeny contribute to a regime of procedural and substantive requirements that this Court has imposed on government efforts to enforce adult obscenity laws. Laws proscribing the dissemination of child pornography, such as 18 U.S.C. § 2252, have not been subject to similar constraints because they do not affect, in any significant manner, the availability of protected speech. *See Osborne*, 495 U.S. at 110; *Ferber*, 458 U.S. at 773.

The *Smith* decision represents one attempt to provide protection to non-obscene, sexually explicit speech by limiting government efforts to suppress obscenity. In *Smith*,

this Court invalidated an ordinance which imposed true strict criminal liability on retailers who distribute obscenity because it "tend[ed] to work a *substantial* restriction of the freedom of the press and speech." 361 U.S. at 150 (emphasis added). *Smith* stands for the proposition that statutes proscribing the distribution of obscenity must contain an element of scienter. *Id.* This requirement serves to guarantee that constitutionally protected speech will not be chilled when the government exacts criminal punishment for the distribution of obscenity. *See Roaden v. Kentucky*, 413 U.S. 496 (1973); *accord Mishkin v. New York*, 383 U.S. 502, 510 (1966); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968) (per curiam).

The government has the right to eliminate obscenity but has no right to employ obscenity laws to censor other sexually explicit speech. *Miller v. California*, 413 U.S. 15, 36 (1973). In other words, obscenity constitutes a sub-set of unprotected expressive activity but, because it is only a sub-set, government must take care not to trample upon the constitutionally protected parent class. Furthermore, because there is a constitutional right to distribute non-obscene pornographic materials to adults, all pornography must be initially presumed to be non-obscene, until proven otherwise. *See Marcus v. Search Warrant*, 367 U.S. 717, 737 (1961); *accord Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62 (1989); *New York v. P.J. Video*, 475 U.S. 868, 869 (1986). The Court in *Smith* protected the presumption of non-obscenity by requiring scienter. In the face of criminal liability without fault for the distribution of obscenity, responsible retailers may, as a practical matter, be compelled to assume that all sexually explicit material is unprotected obscenity and refrain from offering any sexually explicit material for sale. Such a result would fly in the face of both the letter and spirit of *Smith* and its progeny.

18 U.S.C. § 2252, on the other hand, proscribes only pornographic materials containing children and is blind to the

question of obscenity. In *Ferber*, this Court recognized that there is no constitutional right to produce or distribute pornography containing minors. 458 U.S. at 762. This Court has also recognized that government has more freedom to proscribe child pornography than to regulate obscenity. *Compare Osborne*, 495 U.S. at 108 (government may ban mere possession of child pornography) *with Stanley v. Georgia,* 394 U.S. 557, 564-568 (1969) (government may not ban mere possession of obscenity). This is so because the government's interest in eliminating child pornography is more urgent than the government's interests in proscribing obscenity. *See, e.g., American Library Assoc. v. Barr*, 956 F.2d 1178, 1181 (D.C. Cir. 1992) (interest in eliminating child pornography more important than interests in regulating obscenity).

The threat to protected speech that gave rise to the result in *Smith* is not present under 18 U.S.C. § 2252. Proscribing pornography containing minors runs no significant risk of restraining constitutionally protected speech. *Compare Freedman v. Maryland*, 380 U.S. 51, 59-60 (1965)(purpose of presumption of non-obscenity to avoid prior restraints) *with Ferber*, 458 U.S. at 773 (laws proscribing child pornography unlikely to significantly restrain protected speech). This is so because the constitutional tension between a parent class of protected speech and a sub-class of unprotected expressive material is not present in the context of child pornography. There is no class of sexually explicit material containing minors engaging in sexual conduct that is protected by the First Amendment; all such visual depictions are unprotected. *See Ferber*, 458 U.S. at 775 (O'Connor, J., concurring); *see also Osborne*, 495 U.S. at 112 (only visual depictions of "mere nudity" of minors protected by First Amendment). Accordingly, this Court has never held that sexually explicit speech containing minors is presumptively protected by the First Amendment.

Furthermore, the test for child pornography set forth in Section 2252 is objective and precise when compared to the test for obscenity. *Compare Mishkin*, 383 U.S. at 510 (describing obscenity doctrine as somewhat ambiguous) *with Ferber*, 458 U.S. at 764 (government need not prove prurient appeal or redeeming value). Because the standard for child pornography is much clearer, responsible retailers can readily ascertain whether a given piece of sexually explicit merchandise is unprotected child pornography. *Cf. United States v. Weigand*, 575 F.2d 1303, *cert. denied*, 439 U.S. 916 (1987)(federal child pornography standard not vague); *Mishkin*, 383 U.S. at 871 ("The Constitution requires proof of scienter to avoid the hazard of self-censorship *and to compensate for the ambiguities inherent in the definition of obscenity.*")(emphasis added).

Thus, Section 2252 does not threaten to effect a scheme of self-censorship that would result in a substantial reduction of protected expressive material, as was the case with the statute invalidated in *Smith*. Were this Court to permit the government to impose strict liability as to minority on a distributor of child pornography, distributors of sexually explicit material would not be compelled to assume that all sexually explicit material is child pornography and refrain from offering it for sale. At the same time, it would advance the government's compelling interest in preventing "[the] sexual exploitation and abuse of children." *Ferber*, 458 U.S. at 757; *see* Janet Reno & James Smart, *Dealing with Child Abuse and Neglect: a Prosecutor's Viewpoint*, 8 Nova L.Rev. 271, 274-75 (1986)(child sexual abuse necessitates legal intervention). As this Court has recognized, the distribution of child pornography contributes to child sexual exploitation and abuse by fostering a market for pornographic depictions of child abuse that will likely be used to seduce children into harmful sexual activity. *Osborne*, 495 U.S. at 111 & n.7. Section 2252 reduces the availability of this unprotected material by forcing

distributors of pornography to monitor the material they sell. Finally, Section 2252 does not restrain protected speech in any significant way. Thus, neither the letter nor the spirit of *Smith* require scienter as to minority in Section 2252.

II. If this Court Determines that Scienter as to Minority is Present in Section 2252, Constitutional Precedent Requires Only that the Defendant Posses Constructive Knowledge that the Pornography Contains Minors and that Scienter May be Proven Through Circumstantial Evidence.

In the event that this Court should determine that some scienter is required in order for Section 2252 to pass constitutional muster, precedent requires only that a Section 2252 defendant posses constructive knowledge of minority. *Cf. Hamling*, 418 U.S. at 119-24; *Mishkin*, 383 U.S. at 510-11. The Court in *Mishkin* rejected the assertion of a defendant convicted of distributing obscene matter that there was insufficient proof of scienter. 383 U.S. at 511. The *Mishkin* Court held that sufficient evidence of scienter had been introduced because the defendant had engaged in activities indicative of knowledge, although there was no direct evidence of scienter. *Id.*

In *Osborne*, this Court held that in the context of child pornography, recklessness is a constitutionally sufficient level of scienter. 495 U.S. at 115 That rationale is directly applicable to the present case. By imposing criminal sanctions on distributors who disregard a substantial risk that they are trafficking in child pornography, Section 2252 will compel distributors to take due care to ensure that the sexually explicit material they are distributing does not contain children.

Furthermore, *Osborne* strongly indicates that the *Hamling* and *Mishkin* line of authority permitting proof of scienter through indirect and circumstantial evidence should

be applied to Section 2252. *Mishkin*, 383 U.S. at 512 (upholding obscenity conviction based on circumstantial evidence of scienter); *Hamling*, 418 U.S. at 121-22 (same); *Ginsberg*, 390 U.S. at 643-44 (same). Recklessness often involves failure to take due care. Such proof frequently involves circumstantial evidence. That is, the objective facts which render an act reckless must be introduced as evidence. From these facts and the behavior of the defendant, a trier of fact may infer that the defendant acted with reckless intent. Section 2252 only imposes criminal sanctions against distributors who know of the nature and character of the material distributed. In these circumstances, it is incumbent on the distributor to inspect the material to ascertain to whether it contains minors. Failure to so inspect is a reckless act. It is constitutionally appropriate and necessary as a practical matter for Section 2252 to permit proof of reckless intent through circumstantial evidence. It is illegal to distribute visual depictions of minors engaged in sexual conduct. In light of *Hamling* and *Mishkin*, It is constitutionally appropriate to permit proof of intent through circumstantial evidence.

CONCLUSION

The court below erroneously "decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1.(c). This Court provides the only forum in which the constitutional scope of 18 U.S.C. § 2252 may be authoritatively determined. *See United States v. 37 Photographs*, 402 U.S. 363, 369-70 (1970). This provides a compelling reason to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

H. Robert Showers
Counsel of Record
National Law Center for
Children and Families
3975 University Drive, Suite 320
Fairfax, Virginia 22030
(703)-691-4626

APPENDIX

INTEREST AND DESCRIPTION OF *AMICI*

The **National Law Center for Children and Families** ("National Law Center") is a Washington D.C. metro based legal center dedicated to the protection of children and the preservation of families though the enforcement of existing laws and the promulgation of new legislation against illegal pornography and sexual exploitation.

Through the legal staff, resource library, and publications, the National Law Center actively participates in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop illegal pornography and its concomitant harms of sexual exploitation of children, women, and families.

Consultation with many county, city and civic leaders around the nation allows the National Law Center to assist in the drafting and enactment of new legislation. This legislation concerns obscenity, child pornography, and materials harmful to minors. The National Law Center is also involved in the dissemination of vital information to legislators, law enforcement, public officials and concerned citizens alike.

Seminars, newsletters and updated prosecutors' manuals are part of the National Law Center's strategy. This strategy is dedicated to equipping law enforcement with the necessary information, pleadings, and legal techniques necessary to win the war for our children and families.

The National Law Center has participated in numerous Amici Curiae briefs before this Court, including *Osborne v. Ohio, Alexander v. United States* and *Knox v. United States*. Presently, the National Law Center is involved in publishing

training materials and reference manuals on child sexual exploitation and pornography. Its legal staff has conducted legal and law enforcement training for thousands of investigators and prosecutors since 1984.

The **Child Welfare League of America** ("CWLA") is a federation of more than 700 child welfare agencies in the public and voluntary sectors. CWLA is almost three-quarters of a century old and has long been involved in the development of quality program, practice and policy in the field of child welfare, including child protective services. CWLA standards for quality practice address services to abused and neglected children, including children who have been sexually abused. CWLA standards expressly recognize that child sexual abuse includes the exploitation of children and child pornography. CWLA is committed to strong legal protections to ensure that children are not abused through pornographic exploitation and that children are not placed at heightened risk of sexual abuse and victimization by pedophiles as a result of child pornography.

The **Religious Alliance Against Pornography** ("RAAP") was founded in July 1986 by dozens of senior religious leaders who gathered to address the role of hard-core and child pornography in a wide range of health, safety, and moral concerns. These included the relationship of pornography to child molestation, sexual violence, sexually transmitted diseases, rape and human exploitation.

RAAP members include senior leaders in the Roman Catholic, Jewish, Protestant, Orthodox, Mormon and inter-faith communities. Collectively, they serve over one-hundred twenty million citizens throughout the United States. RAAP is likely the broadest religious alliance to ever address any social concern in the United States.

The purpose of RAAP is to bring into clear focus hard-core and child pornography's role in the assault on human dignity and the consequent dehumanization and abuse that it promotes. The devastating impact of hard-core and child pornography is the one issue that has drawn an immense variety of faiths and traditions together in agreement.

While continuing to strongly support and respect the freedoms of speech and expression as guaranteed by the First Amendment, RAAP members are in unanimous agreement that obscenity and child pornography, which are not protected by the Constitution, are life-endangering evils which must be eliminated.

RAAP supports the objectives of the National Law Center for Children and Families and its efforts to pass and strengthen obscenity and child protection laws. RAAP is also active on an international basis, helping facilitate efforts in Asia, Europe and South America to stem the role of pornography in the abuse and degradation of children, women, men and families.

In summary, RAAP is working to (1) create public awareness of pornography's destructive impact on society, to (2) help citizens in community and government leadership understand the moral, physical and social dimensions of sexual exploitation and illegal pornography, and (3) motivate citizens and faith groups to take appropriate and responsible action in this regard.

Childhelp USA has come to the aid of children in distress since 1959. Childhelp is committed to fighting child abuse and neglect with research, treatment, and prevention programs. We operate the National Child Abuse Hotline (1-800-4-A-CHILD and 1-800-2-A-CHILD for the hearing impaired with TDD equipment), America's only 50-state, 24-

hour, toll-free crisis intervention program. The Hotline is staffed by trained counselors with a masters degree or higher and has a data bank of over 60,000 service providers across the country. Childhelp also operates two residential treatment facilities for the most severely physically and sexually abused children ages 2 through 12, one in southern California, and one in central Virginia, and recently initiated programs in Knoxville, Tennessee. Our services include therapeutic foster homes, Head Start programs, group programs for teen and adult survivors of abuse, training programs for child care workers and foster parents, and education and advocacy initiatives.

The **National Center for Missing and Exploited Children** (the "Center") is a non–profit, tax–exempt corporation chartered in the District of Columbia in 1984, with goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children. The Center works in cooperation with the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice in coordinating the efforts of law enforcement, social service agencies, elected officials, judges, prosecutors, educators, and the public and private sectors on child protection issues.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement tasks under 42 U.S.C. §§5771–5777, including operation of the national toll–free hotline for reports of missing children; operation of the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and assistance to OJJDP in performing its task of coordinating federally funded programs related to missing children. The Center actively

assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service, U.S. Postal Inspectors Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, state missing children clearinghouse, non–profit organizations, and interested child advocates, and training to professionals.

The **"Enough is Enough!"** campaign's mission is to greatly reduce sexual violence and to prevent children, women, men and families from becoming victims by eliminating child pornography and removing hard-core and illegal pornography from the marketplace.

This is an educational program with a plan to mobilize America's women in the battle against the abusive, predatory material that is flooding our nation. Pornography leaves in its wake broken lives and homes, as its chain of abuse victimizes women and their children.

The "Enough is Enough!" campaign includes women from varied backgrounds, professions, religions, non-profit organizations and political affiliations. This is a campaign with a focused target (that which is illegal), and a diverse, growing constituency. It is a unique effort in that (moderate, liberal and conservative) women are joining together to deal with hate literature which eroticizes inequality and violence, preys upon children and holds a fatal attraction for many men.

Over 30% of the states' First Ladies and numerous other women of influence have become members of the National Committee of Support, and this list is expanding.

The national launch of the "Enough is Enough!" campaign was held November 1992. Since that date, educational meetings and training seminars have been held in cities from Coast to Coast. This campaign is not creating a new organization rather initiating a movement. Local action is on the increase as women are empowered to bring about change. They are encouraged, educated and provided with materials to equip them to succeed in their efforts. Women are investing their influence to change the way America thinks about pornography.

The **National Coalition Against Pornography** ("N-CAP") was founded in 1983 by Dr. Jerry R. Kirk to respond to the devastating impact of illegal obscenity and child pornography on America. N-CAP holds that these materials have a direct relationship to the skyrocketing incidence of rape, sexual violence and child molestation in the United States. Numerous respected studies confirm this opinion.

With members representing over 50 religious groups, denominations, citizen action groups and foundations, N-CAP works to increase public awareness of the harm caused by obscenity, indecency and child pornography and to implement a number of programs designed to minimize the threat they pose to our society.

These programs include educational/training seminars designed to teach citizens and law enforcement officials how to rid their communities of illegal obscenity and child pornography. Other programs include: victim service development training; legal and law enforcement training on obscenity and child pornography investigations and prosecutions; extensive resource development and distribution, including a wide range of research reports documenting the harm of obscenity, indecency and child pornography; expert

testimony for federal and state legislatures that are considering stronger obscenity and child protection laws. N-CAP founder, Dr. Jerry Kirk, provided testimony before both the U.S. House of Representative and the U.S. Senate in support of the Child Protection and Obscenity Enforcement Act of 1988.

Each of N-CAP's programs is active on national basis, with specific involvement in dozens of local cities at any given time. The fundamental mission and purpose of N-CAP is in protecting children through the elimination of child pornography and obscenity, and the restriction of indecency.

Focus on the Family is a Christian, non–profit organization committed to strengthening the emotional, psychological and spiritual health of children and their families in the United States and throughout the world. Amicus President, Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Amicus has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book *Pornography: A Human Tragedy* which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Amicus' daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1400 stations. Its monthly magazine has a circulation of 1.85 million. Amicus regularly receives letters and telephone calls from and counsels with families who have children devastated by pornography, molestation and abuse.

Focus on the Family works to preserve and protect the family, and thus has particular knowledge about the impact of

child pornography that will be helpful to the Court in this case.

Justice For Children ("JFC") is a national child advocacy organization headquartered in Houston, Texas. JFC works for the child who is abused, abandoned, neglected or simply lost in the child welfare, family court, and/or criminal justice systems. Unlike other child advocacy organizations which have been formed to prevent child abuse through education and social programs, JFC focuses on protecting the abused child once an initial report has been made to the authorities. We work and speak for those who are too young or too frightened to speak for themselves.

The **National Center for Redress of Incest and Sexual Abuse** ("Center for Redress") is a foundation established to address the legal needs of adult survivors and child victims of sexual abuse. Located in Washington, D.C., its purpose is to build a comprehensive network of attorneys across the country who are dedicated to furthering the rights of survivors under the law; to develop educational outreach programs, focusing on members of the judicial and legislative branches of government; to facilitate a national grassroots effort to support projects in progress on the issue of sexual abuse and incest; and to litigate test cases under civil law related to childhood sexual victimization. The Center for Redress believes that the connection between childhood sexual abuse and child pornography has been established beyond doubt, and supports the enforcement of laws aimed at preventing the production and distribution of child pornography, such as the law at issue in this case.

The **American Coalition for Abuse Awareness** ("ACAA") is an ad hoc coalition of individuals and groups committed to resolving the issue of sexual abuse of children. The ACAA has been founded to seek enactment of federal

and state legislation establishing the right of a child to be free from sexual victimization, and appropriate protections to assure that such victimization does not occur; enactment of federal and state legislation extending or eliminating statutes of limitations relating to civil lawsuits brought by adult survivors of childhood sexual abuse; formation of a broad based Coalition to support such legislation; development of public and media awareness of the issue of sexual abuse of children; establishment of a comprehensive network of legal professionals nationwide dedicated to advancing the legal rights of victims of childhood sexual abuse through the justice system; development of educational outreach programs for members of the judicial and legislative branches of government; establishment of a national body to make policy recommendations on issues related to childhood sexual abuse, protection of children, and adult survivors of abuse. Because child pornography both involves and perpetuates the sexual victimization of children, the ACAA supports the respondent in this proceeding.

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues which affect American families. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harms of child pornography that will be helpful to the Court in this case.

Alliance for the Rights of Children (ARCH), a national alliance of children's rights advocacy organizations, respectfully urges the U.S. Supreme Court to grant certiorari on the above case on the issue of whether the First Amendment requires that the government prove scienter as to the minority of "pornographic actors and actresses" in a prosecution for distributing child pornography under 18 U.S.C. Sec. 2252.

Alliance for the Rights of Children is working nationwide with thousands of organizations and individuals who are concerned over the rising reports of child molestation and the failure of the legal system to protect the victims. Child pornography is a multi-billion dollar international business that promotes and perpetuates sex crimes against children.

ARCH strongly supports the arguments in this brief and urges the Court to hear this case.

FILED
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OFFICE OF THE CLERK

(13)

No. 93-723

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

STANLEY FLEISHMAN
Counsel of Record
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077
Counsel for Respondents

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED
NOVEMBER 5, 1993
CERTIORARI GRANTED FEBRUARY 28, 1994

162 pp

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-295 KN

UNITED STATES OF AMERICA, PLAINTIFF

v.

RUBIN GOTTESMAN, INDIVIDUALLY AND DBA AS
R.G. SALES COMPANY, X-CITEMENT VIDEO, INC.,
DEFENDANTS

DOCKET ENTRIES

04/06/88	1	Filed indictment (JUDGE EICK) (Dkt'd 04/12/88).
		Order bench warrant issued (JUDGE EICK) (Dkt'd 04/12/88).
		Bench warrant issued (Dkt'd 04/12/88).
	2	–FLD CR-72 BY AUSA ROBERTA M YANG. FG. (Dkt'd 04/12/88).
04/07/88	6	Notice filed (FLD NOTC OF POST-RESTRAINT HRG ON RESTRNG ORD ISSUED EX PARTE PURS TO 18:2253. FG.) (Dkt'd 04/12/88).
	7	–FLD GOV'T NOTC OF FILING APPLC FOR RESTRNG ORD & RESTRNG ORD PURS TO 18:2253 UNDER SEAL. FG. (Dkt'd 04/12/88).
	8	–FLD GOVT'S EX PARTE APPLC FOR RESTRNG ORD. FG. (Dkt'd 04/12/88).

9 Notice filed (FLD NOTC OF POST-RESTRAINT HRG ON RESTNG ORD ISSUED EX PARTE PURS TO 18:1963(D)(1)(A). FG.) (Dkt'd 04/12/88).

10 –FLD GOVT'S EX PARTE APPL FOR RESTNG ORD PURS TO 18:1963(D)(1)(A). FG. (Dkt'd 04/12/88).

11 –GOVT'S NOTC OF FILING APPLC FOR RESTNG ORD & RESTRNG ORD PURST TO 18:1963(D)(1)(A) UNDER SEAL. FG. (Dkt'd 04/12/88).

12 –GOVT'S EX PARTE MOTN TO SEAL INDICTMENT. FG. (Dkt'd 04/12/88).

13 Order filed (FLD ORD SEALING INDICTMENT. FG.) (JUDGE EICK) (Dkt'd 04/12/88).

14 Order filed (FLD RESTRAINING ORD ISSUED PURS TO 18:1963(D)(1)(A). FG.) (JUDGE HATTER) (Dkt'd 04/12/88).

15 Order filed (FLD RESTRAINING ORD ISSUED PURS TO 18/2253. FG.) (JUDGE HATTER) (Dkt'd 04/12/88).

04/08/88 –DEFT ARRESTED. FG. (Dkt'd 04/12/88).

–(Dkt'd 04/12/88).

–(Dkt'd 04/12/88).

Order corporate surety/cash or in the alternative, personal appearance bail set in the amount of $175,000.00 (A/B W/10% CASH DEP W JUST AFFID OF SURETY & DEED OF PROP, COLL BND OF $175,000 OR CORP SURETY BND OF $175,000 UNTIL 4/15/88 TO FULFILL CONDS, RELSE F/W, SURR PASSPORTS, TRVL RESTR TO CDC, PSA SUPRV, NOT TO ENTER PLACES OF EGRESS W/C PERMITS EXIT FROM CDC. FG.) (Dkt'd 04/12/88).

17 Notice filed (FLD NOTC DIRECT DFT TO APPR FOR ARRN ON INDICT. FG.) (Dkt'd 04/12/88).

17 Arraignment and plea set for 04/11/88 @ 8:30 AM (Counts 1-12) (Dkt'd 04/12/88).

19 Arraignment held (Counts 1-12) (DFT ARRN, DFT INFORMED OF CHRGE & RGHT TO APPT OF CNSL, DFT ADVISED OF CONSEQ OF FALSE STATEMNT OF FIN AFFID, ATTY HAWKINS APPTD/DFPD, TO APPR BEFR FBI FOR BOOKING ON 4/11/88, RELSE ORD #8374. FG.) (JUDGE EICK) (Dkt'd 04/12/88).

19 Arraignment and plea continued to 04/11/88 @ 8:30 AM (Counts 1-12) (POST INDICT ARRN BEFORE MAG REICHMANN. FG.) (JUDGE EICK) (Dkt'd 04/12/88).

		Defendant's first appearance (Dkt'd 04/12/88).
04/11/88	20	Arraignment held (Counts 1-12) (DFT ARRN, STATES T/N AS CHRG, DFT PLNG TO ALL CNTS, CRT ORD JURY TRIAL BEFR JDG KENYON ON 6/7/88 AT 8:00AM, CRT ORDS NOTC TO CNSL & DISCOVERY & INSPECTION ORD ISSUED, DFT GOTTESMAN PLNG TO ALL 12 CNTS, ORENSTEIN PLNG TO CNTS 1-10, X-CITEMENT VIDEO BY ARTHUR SCHWARTS PLN TO CNTS 1-11, R G SALES BY ARTHUR SCHWARTS PLNG TO CTS 7, 9, 11 OF INDICT AS CHRGD. FG.) (MAGISTRATE REICHMANN) (Dkt'd 04/19/88).
		Attorney SCHWARTZ, ARTHUR added to case (MAGISTRATE REICHMANN) (Dkt'd 04/19/88).
		Defendant appears with counsel (Dkt'd 04/19/88).
		–FLD FIN AFFID FOR STEVEN ORENSTEIN, FLD STATEMENTS OF DEFTS' CONST RIGHTS. FG. (Dkt'd 04/19/88).
		Defendant enters plea of not guilty (Counts 1-12) (MAGISTRATE REICHMANN) (Dkt'd 04/19/88).
		Trial date set for 06/07/88 @ 8:00 AM (Counts 1-12) (MAGISTRATE REICHMANN) (Dkt'd 04/19/88).

04/15/88	22	Filed bench warrant returned executed, executed on 04/08/88 (Dkt'd 04/20/88).
04/19/88	24	Filed stipulation between the government and defendant (FLD DEFT'S STIP TO MOD TERMS OF PAYMENT OF BND. FG. SINCE DEFT IS UNABLE TO PAY ALL SUMS AS REQ BY CRT W/IN SPEC TIME, GOVT & DEFT STIP THAT CRT AMENDS ORD OF PAYMNT AS FOLLOWS: BY TENDERING TO USDC CLRK A DEED TO DEFT'S RESIDNCE W/EQUITY OF $125,000 O/B 4/15/88, BY DEPOSITING W/CLRK OF USDC SUM OF $5,000 O/B 4/15/88 & THEREAFTER DEPOSITING $5,000 OR MORE EACH 30 DAYS UNTIL ENTIRE SUM OF $17,500 IS REC'D BY CLRK. FG.) (Dkt'd 04/25/88).
	24	Order filed (CRT APPRVS FOREGOING STIP & BAIL ND PAYMENTS TO BE MADE BY DEFT RUBIN DOTTESMAN ARE MOD IN ACCORD W/STIP. FG.) (JUDGE KENYON) (Dkt'd 04/25/88).
04/22/88	23	Bond (REC'D DEFT'S U.S. PASSPORT, FILED IN EXHB ROOM. FG.) (Dkt'd 04/22/88).
05/04/88	27	–FLD GOVT'S EX PARTE APPLC TO UNSEAL GOVT'S MOTN TO SEAL INDICT & ORD. FG. (Dkt'd 05/06/88).

05/10/88 30 —FLD GOVT'S DECLR OF ROBERT M YANG IN SUPP OF GOVT'S EX PARTE APPLC TO UNSEAL GOVT'S MOTN TO SEAL INDICT & ORD. FG. (Dkt'd 05/13/88).

31 Order filed (FLD ORD RE GOVT'S EX PARTE MOTN TO SEAL INDICT & ORD FILED IN THIS CASE & THEREAFTER SEALED SHALL BE UNSEALD FOR INSPECTION & DISCLRSR IN DISCOV PROC. FG.) (JUDGE KENYON) (Dkt'd 05/13/88).

05/13/88 32 —FLD GOVT'S APPLC FOR REVOC OF BONDS OF RELSE & FOR PRE-TRIAL DETN. LODGED ORDER. FG. (Dkt'd 05/17/88).

05/16/88 33 Status hearing held (DEFTS REQ THAT CRT DECLR THIS A COMPLEX CASE. GOVT AGREES. CRT DECLRS CASE COMPLEX UNDER SPEEDY TRIAL RULES. CRT SETS FOLLOWING DATES: ALL MOTNS ARE TO BE FILED W/IN 30 DAYS & SET FOR HRG ON 8/8/88 AT 1:30PM. GOVT'S OPPOS IS DUE W/IN 30 DAYS AFTR MOTNS ARE FILED. TRIAL IS CONT TO 8/30/88 AT 8:00AM. GOVT TO PREP EXCLDBLE TIME ORD. CRT SETS HRG ON DEFT ORENSTEIN'S MOTN FOR REINSTATEMENT OF BAIL ON 5/19/88 AT 2:00PM. CRT SETS FURTH STAT CONF ON 5/23/88 @ 2:00PM RE FINAL

DETERM OF CNSL FOR DEFT R.G. SALES. DEFT GOTTESMAN TO APPEAR ON 5/19/88 AT 2:00PM FOR STAT OF BAIL. FG.) (JUDGE KENYON) (Dkt'd 05/18/88).

33 Trial date continued to 08/30/88 @ 8:00 AM (Counts 1-12) (JUDGE KENYON) (Dkt'd 05/18/88).

33 Bail hearing set for 05/19/88 @ 2:00 PM (DEFT GOTTESMAN TO APPR FOR STAT OF BAIL. FG.) (JUDGE KENYON) (Dkt'd 05/18/88).

34 —FLD APPLC OF NON-RESIDENT ATTY TO APPR IN SPECF CASE, DESIGNATION & APPR OF CNSL. FG. (Dkt'd 05/18/88).

36 Bond (FLD LTR FROM US DEPT OF STATE RE PASSPORT & ORD PROHIBIT DEFT FROM LEAVING US. FG.) (Dkt'd 05/18/88).

05/17/88 37 Motion filed (MOT #1) (FLD DEFT RUBIN GOTTESMAN'S MOTN FOR MOD OF BAIL BND CONDS PEND TRIAL. FG.) (Dkt'd 05/20/88).

05/19/88 39 Bail hearing held (DEFT ORENSTEIN'S MOTN FOR REINSTATE OF BAIL. CRT HEARS STATE OF CNSL. CRT REINSTATES DEFT ORENSTEIN'S BND UNDER SAME TERMS & CONDS & ADD'L COND THAT DEFT SHALL HAVE INCRSED FREQUENCY OF DRG TESTNG & PARTCIPT IN AN OUT-

PATIENT DRG CNSLNG PROG. CRT HEARS STATE OF CNSL TO MOD BND AS TO DEFT GOTTESMAN. CRT MOD BOND AS FOLLOWS: APPEAR BND $100,000 W/10% CASH DEP W/JUST AFF OF SURETY & W/DEED OF PROP OF $100,000 C/S, W FURTH CONDS: PSA SUPRV, SURRN PASSPORT TO CLRK OF CT, TRVL RESTRC TO CDC, NOT ENTER PREM OF ANY AIRPORT/SEAPORT TERM W/C PERM EXIT FROM CONT U.S., NOT ENTER PREM OF ANY RAILRD, BUS, AIRPORT OR SEAPORT TERM W/C PERMITS EXIT FROM AREA OF RESTRCTD TRVL W/O PERM OF CRT OF PSA. CRT CONT STAT CONF SET ON 5/23/88 TO 6/14/88 @ 2:00PM. FG.) (JUDGE KENYON) (Dkt'd 05/25/88).

39 Order conditions of bond modified (CRT HRS STATE OF CNSL TO MOD BND AS TO DEFT GOTTESMAN. CRT MOD BND AS FOLLOWS: A/B OF $100,000 W/CASH DEP OF 10% W/JUST AFFID OF SURETY & W/DEED OF PROP OR $100,000 C/S, W/ FURTH CONDS: PSA SUPRV, SURRN PASSPORT TO CLRK OF CRT, TRVL REXTC TO CDC, NOT ENTER PREM OF ANY AIRPORT/SEAPORT TERM W/C PERM EXIT

FROM CONT U.S., NOT ENTER PREM OF ANY RAILROAD, BUS, AIRPORT OR SEAPORT TERM W/C PERM EXIT FROM AREA OF RESTRC TRVL W/O PERM OF CRT OR PSA. FG.) (JUDGE KENYON) (Dkt'd 05/25/88).

39 Status hearing continued to 06/14/88 @ 2:00 PM (CRT CONT STAT CONF SET ON 5/23/88 TO 6/14/88 @ 2:00PM. FG.) (JUDGE KENYON) (Dkt'd 05/25/88).

06/08/88 40 –FLD GOVT'S PROP ORD FOR EXCLUSIN OF TIME UNDER SPEEDY TRIAL ACT. FG. (Dkt'd 06/14/88).

06/09/88 41 Motion filed (MOT #2) (FLD GOVT'S MOTN FOR DISQUALIFICATION OF CNSL FOR MULTPLE REPRESNT. MEMO OF PTS & AUTH. DECLR OF KEVIN C POOLE. NOTC OF HRG. HRG DATE 6/14/88 AT 2:00PM. FG.) (Dkt'd 06/14/88).

06/14/88 42 Motion filed (MOT #3) (FLD DEFT RUBIN GOTTESMAN'S MOTN FOR LEAVE TO FILE SUPPLMT'L MOTNS. FG.) (Dkt'd 06/16/88).

43 Motion to dismiss filed (MOT #4) (Counts 1-8) (FLD DEFT RUBIN GOTTESMAN'S MOTN TO DISM CNTS 1-8 OF INDICT & ALL ALLEG REL TO FORFEITURE ON BASIS THAT 18:1462 IS UNCONST. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

44 Motion to dismiss filed (MOT #5) (Counts 1-2) (FLD RUBIN GOTTESMAN'S MOTN TO DISM CNTS 1-2 OF INDICT & ALL ALLEG OF FORFTR REL THERETO ON BASIS THAT 18:1962 & 1963 ARE UNCONST. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

45 Filed memorandum in support of motion to dismiss (MOT #5) (FLD MEMO IN SUPPORT OF DEFT RUBIN GOTTESMAN'S MOTN TO DISM CNTS 1-2 OF INDICT & ALL ALLEG OF FORFEITURE AS THEY RELATE TO DAID DEFT ON BASIS THAT 18: USC 1962 & 1963 ARE UNCONST. FG.) (Dkt'd 06/16/88).

46 Motion filed (MOT #6) (FLD DEFT'S RUBIN GOTTESMAN'S MOTN TO PRESERVE & TO TIMELY PRODUCE AGENT'S ROUGH NOTES. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

47 Motion filed (MOT #7) (FLD DEFT RUBIN GOTTESMAN'S MOTN FOR AN ORD REQ GOVT TO GIVE NOTC OF ITS INTENT TO USE EVID OF OTHER CRIMES, WRONGS OR BAD ACTS & MEMO OF PTS & AUTH. HRG DATE: 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

48 Motion filed (MOT #8) (FLD DEFT RUBIN GOTTESMAN'S MOTN FOR JAMES HRG PURS TO FED RULE

OF EVID 801(D)(2)(E). HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

49 Motion filed (MOT #9) (FLD RUBIN GOTTESMAN'S MOTN FOR A BIFURCATED TRIAL. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

50 Filed memorandum in support of motion (MOT #9) (FLD MEMO IN SUPPORT OF DEFT RUBIN GOTTESMAN'S MOTN FOR A BIFURCATED TRIAL. HRG DATE: 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

51 Motion filed (MOT #10) (FLD DEFT RUBIN GOTTESMAN'S MOTN FOR DISCLSR OF IMPEACHING INFO & INC MEMO OF PTS & AUTH. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

52 Motion filed (MOT #11) (FLD DEFT RUBIN GOTTESMAN'S MOTN FOR PROD OF EXCULPATORY MATERIAL & INC MEMO OF PTS & AUTH. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

53 Motion for joinder filed (MOT #12) (Counts 1-12) (FLD DEFT RUBIN GOTTESMAN'S MOTN TO JOIN IN & ADOPT MOTNS OF CO-DEFTS. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

54 Motion filed (MOT #13) (FLD DEFT RUBIN BOTTESMAN'S MOTN FOR PRODUCTION OF ALL JENCKS MATERIALS & MEMO OF PTS & AUTH. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

55 Motion to dismiss filed (MOT #14) (Counts 1-11) (FLD RUBIN GOTTESMAN'S MTON TO DISM CNTS 1-11 OF INDICT & ALL FORFEITURE ALLEF REL THERETO W/RESPECT TO SAID DEFT, FOR FAILURE TO ALLEGE THAT DEFT KNEW CONTENT & CHARACTER OF ALLEGEDLY OBSCENE MATERIAL. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

56 Motion to dismiss filed (MOT #15) (Counts 1-8) (FLD DEFT RUBIN GOTTESMAN'S MOTN TO DISM CNTS 1-8, INCLUSIVE, OF INDICT. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

57 Motion for discovery/inspection filed (MOT #16) (Counts 1-12) (FLD DEFT RUBIN GOTTESMAN'S MOTN FOR DISCOVRY PURS TO FED RULES OF CRIM PROC R-16 & INC MEMO OF PTS & AUTH. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

58 Motion to suppress evidence filed (MOT #17) (Counts 1-12) (FLD DEFT RUBIN GOTTESMAN'S MOTN TO SUPPRESS & INC MEMO OF PTS &

AUTH. HRG DATE 8/8/88 AT 8:30AM. FG.) (Dkt'd 06/16/88).

59 Motion for joinder filed (MOT #18) (Counts 1-12) (FLD GOVT JOINT MOT FOR MOD OF RESTRNG ORD ISSD PURS TO 18:1963(D)(1)(A). FG.) (Dkt'd 06/17/88).

60 Order filed (FLD ORD MOD RESTRNG ORD ISSD PURS TO 18:1963 (D)(1)(A). FG.) (JUDGE KENYON) (Dkt'd 06/17/88).

61 Order filed (FLD ORD MOD RESTRNG ORD ISSUED PURS TO 18:2253. FG.) (JUDGE KENYON) (Dkt'd 06/17/88).

62 Motion for joinder filed (MOT #19) (Counts 1-12) (FLD JOINT MOTN FOR MOD OF RESTRNG ORD ISSUD PURS TO 18:2253. FG.) (Dkt'd 06/17/88).

63 Order filed (FLD ORD RE STIP RE BND FOR DEFT RUBIN GOTTESMAN. HEREBY ORD THAT STIP BE APPRVD & ENT OF REC. FG.) (JUDGE KENYON) (Dkt'd 06/17/88).

64 Filed stipulation between the government and defendant (FLD GOVT'S STIP RE BND FOR DEFT RUBIN GOTTESMAN. FG.) (Dkt'd 06/17/88).

65 Status hearing held (DEFTS' CNSL REQ ADDT'L 7 DAYS TO FILE MOTNS. CRT GRANTS REQ. DEFT MAY FILE RESPNSE TO MOTN

NOT TO EXCEED 47 PAGES. CRT & CNSL DEISCUSS POTENTIAL CONFLICT OF CNSL AS TO DEFTS X-CITMENT VIDEO & R. G. SALES CO. IT IS DETRMD THAT R.G. SALES CO IS A DBA OF RUBIN GOTTESMAN & THEREFORE CONFLICT DOESN'T EXIST. FG.) (JUDGE KENYON) (Dkt'd 06/22/88).

06/16/88 66 —FLD GOVT'S APPLC FOR WAIVER OF LOCAL R-3.10. LODGED ORD. FG. (Dkt'd 06/22/88).

67 Motion filed (MOT #20) (FLD GOVT'S MOTN FOR DISCLSR OF EVID BY DEFTS. LODGED ORD. FG.) (Dkt'd 06/22/88).

68 —FLD GOVT'S APPLC FOR EXTNSN OF TIME TO FILE MOTIONS. FG. (Dkt'd 06/22/88).

69 Motion in Limine filed (MOT #21) (Counts 1-12) (FLD GOVT'S MOTN IN LIMINE. FG.) (Dkt'd 06/22/88).

70 Motion for joinder filed (MOT #22) (Counts 1-12) (FLD DEFT STEVEN ORENSTEIN'S MOTN TO ADOPT & JOIN IN MOTNS OF CO-DEFT. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/22/88).

71 Motion for severance/separate trial filed (MOT #23) (Counts 1-12) (FLD MOTN OF DEFT STEVEN ORENSTEIN FOR SEVERANCE PURS TO R-8(B) & 14. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/22/88).

72 Motion filed (MOT #24) (FLD MOTN OF DEFT STEVEN ORENSTEIN TO STRIKE PREDJCL SURPLUSAGE FROM INDICT. HRG DATE 8/8/88 @ 1:30PM. FG.) (Dkt'd 06/22/88).

73 Motion to dismiss filed (MOT #25) (Counts 1-12) (FLD DEFT ORENSTEIN'S MOTN TO DISM CNTS 1-7 OF INDICT UNDER NOTC CLAUSE OF 6TH AMENDMENT, INDICT CLAUSE OF 5TH AMENDMENT & FOR FAILURE TO STATE AN OFFENSE. HRG DATE: 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/22/88).

74 Motion to dismiss filed (MOT #26) (Counts 1-12) (FLD DEFT STEVEN ORENSTEIN'S MOTN TO DISM CNTS 1 & 2 OF INDICT & THEIR RELATED FORFEITURE ALLEGATIONS FOR FAILURE TO STATE AN OFFENSE. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/22/88).

75 Motion for a bill of particulars filed (MOT #27) (Counts 1-12) (FLD MOTN OF DEFT STEVEN ORENSTEIN FOR A BILL OF PARTICULARS. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/22/88).

76 Motion to dismiss filed (MOT #28) (Counts 1-12) (FLD DEFT STEVEN ORENSTEIN'S MOTN TO DISM CNTS 1-2 OF INDICT & THEIR CORRESPOND FORFEITURE ALLEG ON GRND THAT STATUTES UPON

WHICH THEY ARE PREMISED & ARE UNCONST ON THEIR FACE & IS APPLIED UNDER 1ST & 5TH AMENDMENTS TO US CONST. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/22/88).

06/17/88 77 –FLD RUBIN GOTTESMAN'S AMENDED NOTICE OF MOTN. HRG DATE 8/8/88 AT 1:30PM. FG. (Dkt'd 06/22/88).

78 Filed memorandum in support of motion in Limine (MOT #21) (FLD GOVT'S MEMO OF PTS & AUTH IN SUPPORT OF MOTN IN LIMINE. FG.) (Dkt'd 06/28/88).

79 –FLD SUPPLMTL DECLR BY ROBERT M YANG IN SUPPORT OF GOVT'S APPLC FOR EXT OF TIME TO FILE MOTNS. FG. (Dkt'd 06/28/88).

80 –FLD SUPPL DECLR BY ROBERTAY M YANG IN SUPPORT OF GOVT'S APPLC FOR WVR OF LOCAL R-3.10. FG. (Dkt'd 06/28/88).

81 Notice filed (FLD GOVT'S NOTC OF HRG ON GOVT'S MOTN IN LIMINE. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/28/88).

82 Notice filed (FLD NOTC OF HRG ON GOVT'S MOTN FOR DISCLSR OF EVID BY DEFT. FG. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/28/88).

06/20/88 83 Notice filed (FLD DEFT STEVEN ORENSTEIN'S NOTC OF CORRECTN OF TIME OF HRG ON PRETRIAL MOTNS FILED ON 6/16/88. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/28/88).

06/21/88 85 Notice filed (FLD NOTC OF ADOPTION AND JOINDER. FG.) (Dkt'd 06/30/88).

06/23/88 84 Motion to dismiss filed (MOT #29) (Counts 9-10) (FLD DEFT STEVEN ORENSTEIN'S MOTN TO DISM CNTS 9 & 10 OF INDICT UNDER NOTC CLAUSE OF 6TH AMENDMENT, INDICT CLAUSE OF 5TH AMENDMENT & FOR FAILURE TO STATE AN OFFNSE. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/28/88).

86 Motion to dismiss filed (MOT #31) (Counts 9-10) (FLD DEFT STEVEN ORENSTEIN'S MOTN TO DISM CNTS 9 & 10 OF INDICT & THEIR CORRESP FORFEITURE ALLEG ON GRND THAT STATUTES UPON W/C THEY ARE PREMISED ARE UNCONST UNDER 1ST AMENDMENT TO U.S. CONST. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 06/30/88).

07/15/88 87 –FLD GOVT'S RESPNSE TO DEFT GOTTESMAN'S MOTN FOR PROD OF EXCULPATORY MAT. HRG DATE 8/8/88 AT 1:30PM. FG. (Dkt'd 07/20/88).

88 —FLD GOVT'S RESPNSE TO DEFT GOTESMAN'S MOTN FOR BIFURCATED TRIAL. HRG DATE 8/8/88 AT 1:30PM. FG. (Dkt'd 07/20/88).

89 Memorandum in opposition to motion (MOT #8) (FLD GOVT'S OPPOS TO DEFT GOTTESMAN'S MOTN FOR A JAMES HRG PURS TO FED RULES OF EVID 802(D)(2)(E). HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/20/88).

90 —FLD GOVT'S RESPNSE TO DEFT GOTTESMAN'S MOTN FOR DISCLSR OF IMPEACHING INFO. HRG DATE 8/8/88 AT 1:30PM. FG. (Dkt'd 07/20/88).

91 —FLD GOVT'S RESPNSE TO DEFT GOTTESMAN'S MOTN TO PRESERVE & TO TIMELY PROD AGENT'S ROUGH NOTES. HRG DATE 8/8/88 AT 1:30PM. FG. (Dkt'd 07/20/88).

92 —FLD GOVT'S RESPNSE TO DEFT GOTTESMAN'S MOTN FOR PROD OF ALL JENCKS MAT. HRG DATE 8/8/88 AT 1:30PM. FG. (Dkt'd 07/20/88).

93 Memorandum in opposition to motion (MOT #7) (FLD GOVT'S OPPOS TO DEFT GOTTESMAN'S MOTN FOR AN ORD REQ GOVT TO GIVE NOTC OF ITS INTENT TO USE OTHER CRIMES, WRONGS OR BAD ACTS. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/20/88).

94 Memorandum in opposition to motion to dismiss (MOT #4) (FLD GOVT'S OPPOS TO DEFT GOTTESMAN'S MOTN TO DISM CNTS 1-8 OF INDICT & ALL ALLEG REL TO FORFTR ON BASIS THAT 18:1462 IS UNCONST. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/20/88).

95 Memorandum in opposition to motion to dismiss (MOT #5) (FLD GOVT'S OPPOS TO DEFT GOTTESMAN'S MOTN TO DISM CNTS 1 & 2 OF DINIDCT & ALL ALLEG OF FORFTR REL THERETO ON BASIS THAT 18:1962 & 1963 ARE UNCONST. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/20/88).

96 —FLD GOVT'S RSPNSE TO DEFT GOTTESMAN'S MOTN FOR DISCOV PURS TO FED RULES OF CRIM PROC R-16. HRG DATE 8/8/88 AT 1:30PM. FG. (Dkt'd 07/20/88).

97 —FLD GOVT'S APPLC FOR EXT OF TIME TO FILE RESPNSES. FG. (Dkt'd 07/20/88).

07/18/88 98 Memorandum in opposition to motion to dismiss (MOT #15) (FLD GOVT'S OPPOS TO DEFT GOTTESMAN'S MOTN TO DISM CNTS 1-8. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/22/88).

99 Memorandum in opposition to motion to dismiss (MOT #26) (FLD GOVT'S OPPOS TO DEFT GOTTESMAN'S

MOTN TO DISM CNT 1-11 & ALL FORFEITURE ALLEG FOR FAILURE TO ALLEGE THAT DEFT KNEW CONT & CHAR OF ALLEG OBSCENE MAT. FG.) (Dkt'd 07/22/88).

100 Order filed (FLD ORD GRANTING EXT OF TIME TO FILE RESPNSES. FG.) (JUDGE KENYON) (Dkt'd 07/25/88).

07/19/88 101 Memorandum in opposition to motion to suppress evidence (MOT #17) (FLD GOVT'S OPPOS TO DEFT GOTTESMNA'S MOTN TO SUPPRESS. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/25/88).

102 Memorandum in opposition to motion for a bill of particulars (MOT #27) (FLD GOVT'S OPPOS TO DEFT'S ORENSTEIN'S MOTN FOR BILL OF PARTICULARS. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/25/88).

110 Memorandum in opposition to motion in Limine (MOT #21) (FLD DEFT STEVEN ORENSTEIN'S BRIEF IN OPPOS TO PLAINTIFF'S MOTN IN LIMINE. 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/28/88).

07/20/88 103 —FLD GOVT'S OPPOS TO DEFT ORENSTEIN'S MOTN TO DISM CNST 9-10 FOR FAILURE TO STATE AN OFFNSE. FG. HRG DATE: 8/8/88 AT 1:30PM. FG. (Dkt'd 07/26/88).

104 —FLD GOVT'S OPPOS TO DEFT ORENSTEIN'S MOTN TO DISM CNT 9-10 UNDER THE 1ST AMENDMENT. FG. HRG DATE: 8/8/88 AT 1:30PM. FG. (Dkt'd 07/26/88).

105 Memorandum in opposition to motion to dismiss (MOT #28) (FLD GOVT'S OPPO TO DEFT ORENSTEIN'S MOTN TO DISM CNTS 1-2 OF INDICT UNDER 1ST & 5TH AMENDMENTS. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/26/88).

106 Memorandum in opposition to motion to dismiss (MOT #26) (FLD GOVT'S OPPOS TO DEFT ORENSTEIN'S MOTN TO DISM CNTS 1-2 FOR FAILURE TO STATE AN OFFENSE. FG. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/26/88).

107 Memorandum in opposition to motion to dismiss (MOT #25) (FLD GOVT'S OPPOS TO DEFT ORENSTEIN'S MOTN TO DISM CNST 1-7 FOR FAILURE TO STATE AN OFFNSE. HRG DATE 8/8/88 AT 1:30PM. FG.) (Dkt'd 07/26/88).

07/21/88 108 —FLD GOVT'S RESPNSE TO DEFT ORENSTEIN'S MOTN FOR SEVERANCE. HRG DATE 8/8/88 AT 1:30PM. FG. (Dkt'd 07/26/88).

109 —FLD GOVT'S RESPNSE TO DEFT ORENSTEIN'S MOTN TO STIKE SURPLUSAGE. HRG DATE 8/8/88 AT 1:30PM. FG. (Dkt'd 07/26/88).

07/25/88 111 —Filed surety bond in the amount of $100,000.00 (A/B W/AFFID OF SURETY & DEED OF PROP. W/10% CASH DEP. W/DEED OF PROP. DEFT TO SURRN PASSPORTS TO CLRK OF CRT. TRVL RESTRC TO CDC. PSA SUPRV. NOT ENTER PLACES OF EGRESS W/C PERMITS EXIT FROM CDC. NOT ENTER ANY AIRPORT/SEAPORT TERM W/C PERMITS EXIT FROM CONT. U.S. FG.) (KING) (Dkt'd 07/28/88).

07/27/88 112 Order filed (FLD ORD FOR EXCLSN OF TIME UNDER SPEEDY TRIAL ACT. FG.) (JUDGE KENYON) (Dkt'd 08/01/88).

113 Excludable delay based on finding the ends of justice served by continuance began on 04/11/88 and ended on 08/30/88 (JUDGE KENYON) (Dkt'd 08/01/88).

08/01/88 115 —FLD DEFT RUBIN GOTTESMAN'S REQ FOR PERMISSN TO LEAVE JURISDICTION. FG. (Dkt'd 08/05/88).

116 Notice filed (FLD GOVT'S NOTC OF NON-OPPOS TO DEFT ORENSTEIN'S MOTN TO AMEND BAIL CONDS. FG.) (Dkt'd 08/05/88).

117 Notice filed (FLD GOVT'S NOTC OF NON-OPPOS TO DEFT GOTTESMAN'S REQ FOR PERMSN TO LEAVE JURISDCTN. FG.) (Dkt'd 08/05/88).

08/02/88 118 Status hearing held (CRT REC'D DEFT'S REQ FOR PERM TO LEAVE JURISDICTION, FLD 8/1/88. DEFT GOTTESMAN ASKS CRT FOR AN ORD GRANTING HIM PERMISSN TO LEAVE STATE OF CA TO TRVL TO LV/NV 8/1/88 TO 8/10/88 TO ATTEND VSDA NATL VIDEO TRADE SHOW. GOVT FLD NOTC OF NON-OPPOS TO DEFT'S REQ ON 8/1/88. CRT HEREBY GRANTS DEFT GOTTESMAN'S REQ. DEFT IS ADVSD THAT IN FUTURE, SUCH REQ SHLD BE MADE MORE TIMELY FASHION. IN ADDTN SUCH REQ SHLD BE ACCOMPANIED W/PROP ORD. FG.) (JUDGE KENYON) (Dkt'd 08/10/88).

119 Notice filed (FLD NOTC OF CONT OF MOTN HRG SET FOR 8/8/88 TO 8/24/88 AT 2:00PM. FG.) (Dkt'd 08/10/88).

119 Status hearing set for 08/24/88 @ 2:00 PM (JUDGE LEW) (Dkt'd 08/10/88).

08/08/88 238 Bond (FLD ORIGINAL DEED FRM COUNTY RECORDER OFC ADDRESS 7116 DECELIS PLCE VAN NUYS, CA 91406. COMMN ADDRESS 22482 CALIPATRIA DRIVE, WOODLAND HILLS, CA. SM LOT 121 OF TRACT NO 29150.) (Dkt'd 02/23/90).

Bond (FLD DEED OF TRUST OF RUBIN & BARBARA GOTTESMAN IN EXHB RM. FG.) (Dkt'd 09/09/88).

	238	Bond (FLD ORIG DEED OF TRUST FRM RECORDERS OFFICE IN L.A. PROPERTY OWNER RUBIN GOTTSMAN AND BARBARA GOTTESMAN. RJ) (Dkt'd 02/22/90).
08/10/88	122	Motion filed (MOT #34) (DFT FLD MOTN TO ADOPT DFT'S BRIEF IN OPP TO PLAINTIFF'S MOTN IN LIMINE RET 8/24/88 AT 1:30PM. SM) (Dkt'd 08/18/88).
08/22/88	123	Witness list filed (Counts 1-12) (FLD GVT'S WITNESS LIST. SM) (Dkt'd 08/23/88).
08/23/88	124	—FLD GVT'S RESPONSE TO DFT GOTTESMN MOTN TO CONT TRIAL. SM (Dkt'd 08/25/88).
08/24/88	140	Status hearing held (DEFT GOTTESMAN, ORENSTEIN & GOVT'S MOTNS. CRT HEARS STATS BY (ARTIES. CRT GRANTS & DENIES CERTAIN MONS BY CNSL. FG.) (JUDGE KENYON) (Dkt'd 10/04/88).
08/26/88	125	Filed government's proposed jury instructions (Counts 1-12) (FLD GOVT'S PROP JY INSTRC. FG.) (Dkt'd 08/30/88).
	126	Filed government's proposed jury instructions (Counts 1-12) (FLD GOVT'S SUPPLMTL PROP JY INSTRC. FG.) (Dkt'd 08/30/88).
08/29/88	127	Status hearing held (CNSL ADVS CRT THAT PARTIES HAVE REACHED AN AGREEMENT IN CASE &

		DEFTS HAS AGREED TO PLEA AGREEMNT. CRT CONT MATTER TO 8/30/88 AT 8:00AM TO ALLOW PARTIES MORE TI TO CONSID MATTERS. FG.) (JUDGE KENYON) (Dkt'd 09/15/88).
	127	Status hearing set for 08/30/88 @ 8:00 AM (JUDGE KENYON) (Dkt'd 09/15/88).
08/30/88	128	Status hearing held (CHNGE OF PLEA. W/DRAWL OF PLEA & SET OF NEW TRDAT. CASE WAS CLLD FROM CAL AT W/C TI DEFTS CHNGED THEIR PLEA F ROM N/G TO GUILTY TO CERTAIN CNTS OF INDICT. AFTER DUE CONSID OF STATE OF DEFTS CRT DID NOT TAKE PLEA & SET NEW TRDAT OF 10/3/88 AT 8:00AM. ANY MOTNS WILL BE HRD ON 9/27/88 @ 2:00PM. GOVT TO SUBMT EXCLDBLE TI ORD TO CRT. FG.) (JUDGE KENYON) (Dkt'd 09/15/88).
09/27/88	142	Order filed (FLD AGREED ORD OF FORFEITURE. INC BY REF SET FORTH IS MEMO OF PLEA AGREEMNT OF DEFT ORENSTEIN. BY AGREEMENT OF ALL PARTIES, FOLLOWING ITEMS WILL BE FORFEITED TO US GOVT EFFECTIVE UPON ENT GUILTY PLEAS REF IN MEMO OF PLEA AGREEMENT. FURTHERMORE, SAID DEFT AGREES TO DISCLOSE TO

SPECIAL AGEN KEVIN C POOLE, FBI, ANY & ALL ADD'L INTRST W/C MAY SUBJ TO FORFEITURE W/IN 24 HRS FOLLOWING ENT OF GUILTY PLEA. IN EVENT DEFT STEVEN ORENSTEIN HAS PROP CONST & DERIVED FROM PROCEEDS OBTAINED, DIRECTLY & INDIRECTLY FROM RACKETEERING 18:1962 ALL SUCH PROP WHEREVER LOC & WHATEVER NAMES HLD IS SUBJ TO FORFEITURE. IT IS ORD & ADJDGED THAT FOREGOING PROPERTY AS REF IS FORFEITED TO US. FG.) (JUDGE KENYON) (Dkt'd 10/04/88).

143 —FLD MEMO OF PLEA AGREEMENT FOR DEFT STEVEN ORENSTEIN. FG. (Dkt'd 10/04/88).

09/28/88 144 Motion filed (MOT #36) (FLD GOVT'S MOTN FOR RECONSID OF DEFT ORENSTEIN'S MOTN TO STRIKE SURPLUSAGE & MOTN FOR SEVRNCE. HRG DATE 9/29/88 AT 8:00AM. FG.) (Dkt'd 10/04/88).

09/29/88 145 Status hearing held (PROC ON GOVT'S MOTNS IN LI, STRIKE SURPLS, & DISCLSE EVID. CRT HRS STATES OF CNSL. CRT GRNTS GOVT'S MOTNS TO STRIKE & FOR DISCLSR. CRT CONTS MOTN IN LI TO 10/3/88 AT 11:00AM. DEFT MONTS FOR CONT OF TRIAL. CRT TAKES MATTER UNDER SUBMSN.

FG.) (JUDGE KENYON) (Dkt'd 10/04/88).

10/03/88 146 Status hearing held (GOVT'S MOTN IN LIMINE & DEFT'S MOTN TO CONT TRIAL. CRT HEARS ARG OF CNSL. CRT DENIES GOVT'S MOTN IN LI. CRT DENIES MOTN TO CONT TRIAL. FG.) (JUDGE KENYON) (Dkt'd 10/06/88).

Motion in limine denied (MOT #21) (JUDGE KENYON) (Dkt'd 10/06/88).

147 Defendant's requested voir dire (FLD DEFTS' JOINT PROP VOIR DIRE QUEST TO PROSP JURORS. HRG DATE 10/3/88 @ 9:00AM. FG.) (Dkt'd 10/06/88).

148 Defendant's requested voir dire (FLD PROP VOIR DIRE QUEST BY DEFT X-CITEMENT VIDEO INC. HRG DATE 10/3/88 AT 9:00AM. FG.) (Dkt'd 10/06/88).

10/04/88 149 Status hearing held (GOVT INFORMS CRT THAT ONE OF THEIR KEY WITNESSES HAS BEEN HOSP. DEFTS RENEW MOTN TO CONT TRIAL. CRT HEARS ARG OF CNSL. CRT CONT TRIAL 3/21/89 @ 8:00 AM & SETS TRIAL AS TO SEVRD CNT 12 ON 10/11/88 @ 8:00AM. GOVT TO PREP ORD FOR EXCLDBLE TIME. FG.) (JUDGE KENYON) (Dkt'd 10/06/88).

		Trial date continued to 10/11/88 @ 8:00 AM (Count 12) (JUDGE KENYON) (Dkt'd 10/06/88).
		Trial date continued to 03/21/89 @ 8:00 AM (Counts 1-11) (JUDGE KENYON) (Dkt'd 10/06/88).
10/05/88	150	Notice filed (FLD GOVT'S NOTC OF FILING WITN STATEMT UNDER SEAL. FG.) (Dkt'd 10/06/88).
	151	–FLD GOVT'S WITN STATEMTS FILED UNDER SEAL. FG. (Dkt'd 10/06/88).
10/06/88	152	Motion in limine filed (MOT #37) (Counts 1-12) (FLD GOVT'S MOTN IN LI & MEMO PTS & AUTH IN SUPPORT THEREOF. FG.) (Dkt'd 10/11/88).
10/13/88	153	Trial begins-bench (Counts 1-12) (JUDGE KENYON) (Dkt'd 10/18/88).
		Trial held-bench (Counts 1-12) (C/T AST DAY. CNT 12 ONLY–DEFT RENEWS MOTN TO SUPP EVID OF FIREARM. CRT DENIES MOTN. WITN CLLD, SWRN, TSTFD. EXHB MARKED & ADMTD. PLTF REST. DEFT REST. CRT ORDS CASE AGENT TO RETAIN CUST OF EXHB 105 (GUN). CRT CONTS TRIAL TO 10/12/88 AT 8:00AM FOR CLSNG ARG. FG.) (JUDGE KENYON) (Dkt'd 10/18/88).
		Bench trial continued to 10/14/88 @ 8:00 AM (CONT TO 2ND B/T. FG.) (JUDGE KENYON) (Dkt'd 10/18/88).

	154	Filed waiver of jury trial (FLD DFT'S WVR OF TRIAL BY JY & WVR OF SP FINDINGS OF FACT (R- 23(A) & (C) FRCP). FG.) (JUDGE KENYON) (Dkt'd 10/18/88).
10/14/88	155	Trial held-bench (Counts 1-12) (C/T 2ND DAY. A) (JUDGE KENYON) (Dkt'd 10/19/88).
		Trial ends-bench (Count 12) (JUDGE KENYON) (Dkt'd 10/19/88).
		Court judgment of not guilty (Count 12) (JUDGE KENYON) (Dkt'd 10/19/88).
	163	Exhibit list filed (Count 12) (FLD LSIT OF EXHB & WITN. FG.) (Dkt'd 11/07/88).
10/27/88	157	–FLD GOVT'S RESPNSE TO DEFT ORENSTEIN'S MOTN FOR CONT OF SENT. FG. (Dkt'd 11/01/88).
	158	–FLD GOVT'S REVISED PROP ORD FOR EXCLSN OF TIME UNDER SPEEDY TRIAL ACT. FG. (Dkt'd 11/01/88).
10/28/88	161	Order filed (FLD ORD FOR EXCLSN OF TIME UNDER SPEEDY TRIAL ACT. FG.) (JUDGE KENYON) (Dkt'd 11/04/88).
10/31/88	159	–FLD GOVT'S ADDT'L PROP JY INSTRC. FG. (Dkt'd 11/02/88).
	162	Excludable delay based on finding the ends of justice served by continuance began on 10/04/88 and ended on 03/21/89 (JUDGE KENYON) (Dkt'd 11/04/88).

12/09/88	164	–FLD DECLR OF MICHAEL N BERKE IN SUPP OF APPLC FOR AN ORD ON BEHALF OF GOTTESMAN & ORENSTEIN. FG. (Dkt'd 12/14/88).
12/13/88	165	Order conditions of bond modified (FLD ORD THAT DEFTS RUBIN GOTTESMAN & STEVEN ORENSTEIN BE PERMTD TO TRVL TO LAS VEGAS TO ATTEND CONSUMER ELEC SHOW FOR 1/6/89 TO 1/11/89. FG.) (JUDGE KENYON) (Dkt'd 12/14/88).
03/15/89	166	–FLD GOVT'S TRIAL BRIEF. HRG DATE 3/21/89 AT 1:30PM. FG. (Dkt'd 03/24/89).
03/16/89	167	Status hearing held (CRT & CNSL CONFER. CRT CONT TRIAL TO 4/11/89 AT 8:00AM. FG.) (JUDGE KENYON) (Dkt'd 03/24/89).
04/10/89	169	Motion filed (MOT #39) (FLD DEFT GOTTESMAN S MOTN TO WV JY. FG.) (Dkt'd 04/13/89).
	170	Waiver of jury trial (Counts 1-11) (FLD JY WVR BY DFT X-CITEMENT VIDEO, INC. FG.) (Dkt'd 04/13/89).
	171	–FLD GOVT'S RESPNSE TO DEFTS' MOTN TO WVE J/T. FG. (Dkt'd 04/13/89).
04/11/89	172	Witness list filed (Counts 1-11) (FLD GOVT'S 3RD AMENDED WITN LIST. FG.) (Dkt'd 04/19/89).
04/12/89	173	–FLD LTR FROM US DEPT OF JUST, WASHINGTON DC. FG. (Dkt'd 04/19/89).

	174	–FLD LTR FROM US DEPT OF JUST, CRIMNL DIV, WASHINGTON DC. FG. (Dkt'd 04/19/89).
	177	Trial held-bench (Counts 1-8) (JUDGE KENYON) (Dkt'd 06/01/89).
		Bench trial continued to 04/13/89 @ 9:15 AM (JUDGE KENYON) (Dkt'd 06/01/89).
04/13/89	178	Trial held-bench (Counts 1-11) (CT 2ND DAY. PLTF WTN C/S/T: PETERS, MRK EXHB. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
		Bench trial continued to 04/14/89 @ 8:00 AM (CONT TO 3RD B/T. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
	179	Witness list filed (Counts 1-11) (FLD GOVT'S 4TH AMENDED WITN LIST. FG.) (Dkt'd 06/01/89).
04/14/89	175	Exhibit list filed (Counts 1-11) (FLD GOVT'S 2ND AMENDED EXHB LST. FG.) (Dkt'd 04/21/89).
	180	Trial held-bench (Counts 1-11) (C/T 3RD DAY. GOV WITN PETERS RESUMES. GOV WITN C/S/T TAKESHITA. ID'D EXHS. CONT TO 4/17/89 AT 8:00AM. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
		Bench trial continued to 04/17/89 @ 8:00 AM (CONT TO 4TH B/T. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
04/17/89	181	Trial held-bench (Counts 1-11) (C/T 4TH DAY. WITN TAKESHITA RESUMES TESTMNY. EXHB MRKD.

TRIAL CONT TO 4/19/89 AT 8:00AM. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

Bench trial continued to 04/19/89 @ 8:00 AM (CONT TO 5TH B/T. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

04/19/89 182 Trial held-bench (Counts 1-11) (C/T 5TH DAT. WITN RESUMES TEST-MNY. CRT VIEWS VIDEO TAPES. EXHB MRKD. CRT CONTS TRIAL TO 4/25/89 AT 8:00AM. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

Bench trial continued to 04/25/89 @ 8:00 AM (CONT TO 6TH B/T. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

04/25/89 183 Trial held-bench (Counts 1-11) (C/T 6TH DAY. WITN TAKESHITA RESMS TESTMNY. EXHB MRK. WITNS CALLED, SWRN & TSFD. TRIAL CONTS TO 4/26/89 AT 8:00AM. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

Bench trial continued to 04/26/89 @ 8:00 AM (CONT TO 7TH B/T. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

04/26/89 184 Trial held-bench (Counts 1-11) (C/T 7TH DAY. WITN CALLED, SWRN & TESTFD. EXHB MRKD. TRIAL CONT TO 4/27/89 AT 8:00AM. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

Bench trial continued to 04/27/89 @ 8:00 AM (CONT TO 8TH B/T. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

185 Motion filed (MOT #40) (FLD DEFT X-CITEMENT VIDEO INC'S MOTN FOR JDGMT OF ACQ PURS TO R-29, RULES OF CRMNL PROC & MEMO IN SUPPORT. FG.) (Dkt'd 06/01/89).

04/27/89 186 Trial held-bench (Counts 1-11) (C/T 9TH DAY. CRT TAKES DEFT'S MOTN FOR JDMGT OF ACQ UNDER SUBMSN. DEFT OBJECTS TO PLTF'S EXHB 15-18. CRT TAKES MATTER UNDER SUBMS. EXHB ADMTD. GOVT REST. DEFNSE GIVES OPENG STMTS. WITNS CALLED SWRN & TESFTD. TRIAL CONT TO 4/28/89 AT 8:00AM. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

Bench trial continued to 04/28/89 @ 8:00 AM (CONT TO 10TH B/T. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

187 – FLD GOVT'S RESPNSE TO DEFTS' MOTN FOR JDGMT OF ACQ. FG. (Dkt'd 06/01/89).

04/28/89 188 Trial held-bench (Counts 1-11) (C/T 10TH DAY. WITNS CALLED, SWRN & TESTFD. EXHB MRKD. CRT HEARS ARG RE EXPERT TEST-MNY. CRT HEARS EXPERT TEST-MNY & REVWS VIDEO TAPES. TRIAL CONT TO 5/1/89 AT 8:00AM. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

Bench trial continued to 05/01/89 @ 8:00 AM (CONT TO 11TH B/T. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

05/01/89	189	Trial held-bench (Counts 1-11) (C/T 10TH DAY. CRT HERS ARG RE MOTN FOR JDGMT OF ACQ. CRT TAKES MOTN UNDER SUBMS. CRT CONTS TRIAL TO 5/3/89 AT 7:30AM. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
		Bench trial continued to 05/03/89 @ 7:30 AM (CONT TO 11TH B/T. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
05/03/89	190	Trial held-bench (Counts 1-11) (C/T 11TH DAY. CRT GRANDS DISM AS TO CNTS 1-8 OF INDICT. CRT DENIES DISM AS TO CNTS 9, 10, & 11. WITNS CALLED, SWRN & TSTFD. DEFT REST. GOVT RECALLS WITNS. CRT HEARS CLOSING ARG. CRT CONTS MATTER FOR RULING RE CNTS 9, 10 & 11. TO 5/23/89 AT 2:00PM. BRIEFS TO BE FLD W/IN 10 DAYS & RESPNSE W/IN 5 DAYS. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
		Dismissed on court's motion (Counts 1-8) (CRT GRANTS DISM AS TO CNTS 1-8 OF INDICT. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
		Bench trial continued to 05/23/89 @ 2:00 PM (CONT TO 12TH B/T. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
05/10/89	191	Status hearing held (IN CHMBRS. W/ RESPECT TO ADMSN OF CERTIFIED COPIES OF COPYRIGHT REGIST CRT FINDS W/OUT SHOWING THAT CERFD COPIES OF COPYRIGHT REFER SPEC TO ACTUAL TAPES BEFR CRT, SUCH EVID. IS INADMISSIBLE. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
05/15/89	192	–FLD DEFT RUBIN GOTTESMAN'S BRIEF IN SUPP OF MOTN FOR JDGMT OF ACQ, OR IN ALTN, MOTN TO DISM INDICT. FG. (Dkt'd 06/01/89).
	193	–FLD DEFT RUBIN GOTTESMNA'S BRIEF IN SUPP OF MOTN FOR JDGMT OF ACQ, OR IN ALTN MOTN TO DISM INDICT. FG. (Dkt'd 06/01/89).
	194	Motion for judgment of acquittal filed (MOT #41) (Counts 9-11) (FLD MOTN FOR JDGMT OF ACQ ON CNTS 9, 10, 11. FG.) (Dkt'd 06/01/89).
05/16/89	195	–FLD PROP FINDINGS OF FACT RE CNTS 9, 10, 11. ERRATA SHEET. FG. (Dkt'd 06/01/89).
05/18/89	196	Notice filed (FLD GOVT'S NOTC OF INTENTION TO RE-OPEN IT'S CASE IN CHIEF. FG.) (Dkt'd 06/01/89).
	197	–FLD GOVT'S APPLC FOR EXTENSION OF TI TO FILE RESPONSES. HRG DATE 5/23/89 AT 1:30PM. FG. (Dkt'd 06/01/89).
05/23/89	198	Status hearing held (CRT CONTS HEARING FOR JDGMT OF ACQ TO 6/15/89 AT 2:00PM. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).

		Status hearing set for 06/15/89 @ 2:00 PM (JUDGE KENYON) (Dkt'd 06/01/89).
05/24/89	199	–FLD RECPT FOR REPORTER'S TRNSCRPT. FG. (Dkt'd 06/01/89).
	200	Filed transcript of proceedings for 05/03/89 (FLD TRNSCPRT OF PROC. FG.) (Dkt'd 06/01/89).
	201	Order filed (FLD ORD GRANTING GOVT'S APPLC FOR EXTN OF TI TO FILE ITS RESPNSES. FG.) (JUDGE KENYON) (Dkt'd 06/01/89).
06/02/89	204	–FLD GOVT'S PROP FINDINGS OF FACT RE OBSCENITY. FG. (Dkt'd 06/06/89).
06/13/89	207	–FLD GOVT'S EX-PARTE MOTN TO CONT TRIAL & DECLR OF DREW S PITT. DATE: 6/15/89 AT 2:00PM. LODGED ORD. FG. (Dkt'd 06/15/89).
06/15/89	208	Trial held-bench (Counts 9-11) (B/T 12TH DAY. GOVT ORAL MOTN FOR CONT DENIED. CT ALLOWS GOVT TO REOPEN CASE FOR LTD PURP OF COPYRIGHT EVID AS WAS CONTIGENT TO GOVT RESTG EARLIER. WITNS CST. EXHS ID & ADMIT. GOVT RESTS. CT MAKES FINDGS. CRT FINDS DEFTS RUBIN GOTTESMAN/R.G SALES CO, & X-CITEMENT VIDEO INCE. GUILTY AS CHRGD IN CNTS 9, 10, & 11. CRT ORD SENT FOR

		8/7/89 AT 2:00PM. CRT ORD CNSL & DEFTS PRES FOR SENT. FG.) (JUDGE KENYON) (Dkt'd 07/06/89).
		Trial ends-bench (Counts 9-11) (JUDGE KENYON) (Dkt'd 07/06/89).
		Court judgment of guilty (Counts 9-11) (JUDGE KENYON) (Dkt'd 07/06/89).
		Order cause referred to the probation department for a pre-sentence investigation (Counts 9-11) (JUDGE KENYON) (Dkt'd 07/06/89).
		Sentencing set for 08/07/90 @ 2:00 PM (Counts 9-11) (JUDGE KENYON) (Dkt'd 07/06/89).
	214	–FLD LIST OF EXHBS & WITNS. FG. (Dkt'd 08/17/89).
06/30/89	209	–FLD DEFT GOTTESMAN'S REQ TO TRVL TO HOUSTN, TX ON 7/15-7/17/89 & TRIP TO LAS VEGAS, NV ON 8/5-9/89 TO ATTEND CONVENTION. FG. (Dkt'd 07/14/89).
		Order conditions of bond modified (DEFT'S REQ TO TRVL TO HOUSTON, TX & LAS VEGAS, NV IS GRANTED. FG.) (JUDGE KENYON) (Dkt'd 07/14/89).
	210	–FLD DEFT GOTTESMAN'S MOTN TO CONT SENT DATE TO 8/21/89 @ 2:00PM. FG. (Dkt'd 07/14/89).
		Order filed (DEFT'S REQ GRANTED TO CONT SENT DATE TO 8/21/89 AT 2:00PM. FG.) (JUDGE KENYON) (Dkt'd 07/14/89).

		Sentencing continued to 08/21/89 @ 2:00 PM (Counts 9-11) (JUDGE KENYON) (Dkt'd 07/14/89).
07/24/89	213	Status hearing held (PER REQ OF PO, SENT IS CONT TO 9/25/89 AT 1:30PM. IF CNSL HAS ANY OBJCT TO CONT PLEASE CONTACT CRT. FG.) (JUDGE KENYON) (Dkt'd 08/09/89).
		Sentencing continued to 09/25/89 @ 1:30 PM (Counts 9-11) (JUDGE KENYON) (Dkt'd 08/09/89).
08/21/89	215	Order conditions of bond modified (DFT FLD REQUEST FOR PERMITTION TO TRVL AND ORD, IT IS ORD THAT THE DFT MAY TRVL. SM) (Dkt'd 08/25/89).
08/28/89	216	–FLD RECEIPT FOR REPORTER'S TRANSCRIPT DATE OF HRG 6/15/89. SM (Dkt'd 08/31/89).
	217	Filed transcript of proceedings for 06/15/89 (Dkt'd 08/31/89).
09/20/89	219	Order filed (FLD FINDINGS OF FACT & CONC OF LAW RE CTS 9, 10-11. TO THE EXTENT THAT THE PRECEDING CONC OF LAW MAY BE DEEMED TO BE FINDINGS OF FACT, THEY ARE HEREBY INCORP BY REFERENCE INTO THE FINDINGS OF FACT. KKG) (JUDGE KENYON) (Dkt'd 09/25/89).
09/25/89	220	Sentencing continued to 10/23/89 @ 1:30 PM (Counts 9-11) (DFTS REQUEST. KKG) (JUDGE KENYON) (Dkt'd 09/26/89).

10/23/89		Attorney SCHWARTZ, ARTHUR deleted from case (FLD SUB OF CNSL. KKG) (JUDGE KENYON) (Dkt'd 10/27/89).
		Attorney FLEISHMAN, STANLEY added to case (JUDGE KENYON) (Dkt'd 10/27/89).
	222	Filed substitution of FLEISHMAN, STANLEY as attorney for defendant (JUDGE KENYON) (Dkt'd 10/27/89).
	223	Sentencing of defendant (Counts 9-11) (DFT COMM TO THE CUST OF THE BOP FOR 12 MOS AS TO CT 9, CT 10-11 IMPOS OF SENT IS SUSP, DFT IS PLC ON 3 YRS PROB AS TO CT 10 & 11, TO RUN CONC, UPON REL FR IMPRI ON THE FOLWNG COND (1) OBEY R&R OF PO & GO 225, (2) OBEY ALL FED, STS & LOC LAWS (3) RPT TO PO W/I 72 HRS AFTER REL (4) POSS NO FIREARMS (5) NOT ILLEG POSS ANY CONT SUBS (6) SHALL PART AS INST BY PO, IN A PRGRAM APPROV BY THE PO FOR TRTMNT OF DRUG & ALC ABUSE (7) SHALL NOT PROD, DIST, HANDLE, PROMOTE ANY FILS VIDEOS REC OR ANY COMPO THEREOF WH MAY INC CHILD PORN. DFT SHALL SURR 11-27-89 @ 12 NOON TO DES FAC OR INST OR USM. DFT IS ADV OF HIS RIGHT TO APPEAL. CRT REQ CNSL SUB A MTN FOR BAIL ON

APPEAL. GVT MOVES TO DISM ALL REMNG CTS. THE BND IN EX-ON UPON SURR. KKG) (JUDGE KENYON) (Dkt'd 10/30/89).

223 Bond exonerated upon surrender (DFT TO SURR ON 11-27-89 @ 12 NOON. KKG) (JUDGE KENYON) (Dkt'd 10/30/89).

10/25/89 227 Filed notice of appeal (Counts 9-11) (APPL #2) (FLD DFT GOTTESMAN NOTC OF APPEAL TO THE 9TH CIR C/A FRM J/M ENT 10-23-89, BILLED & FRMS GVN. KKG) (JUDGE KENYON) (Dkt'd 10/31/89).

10/26/89 224 Issued judgment and commitment to U.S. Marshal (Counts 9-11) (J/M ENT 10-30-89. KKG) (JUDGE KENYON) (Dkt'd 10/30/89).

228 Motion for bail pending appeal filed (MOT #43) (FLD MTN FOR BAIL PNDING APPEAL & STAY: MEMO IN SUPPORT DECLARATIONS OF RUBIN GOTTESMAN & STANLEY FLEISHMAN IN SUPPORT. KKG) (Dkt'd 10/31/89).

11/06/89 229 –(APPL #2) (FLD FRM 9TH CIR ORD FOR TIME SCHED. DATE TRANSC ORD FRM THE CRT RE-PTR 11-21-89. THE CRTS REPTRS TRANSC WILL BE FLD IN THE DIST CRT 12-21-89. APPELLANTS OPENNING BRIEF AND EXCERPTS OF RECORD WILL BE SVD AND

FLD 1-30-90. THE BRIEF OF AP-PELLEE WILL BE SVD AND FLD 3-1-90. HE OPTIONAL REPLY BRIEF OF APPELLANT WILL BE SVD AND FLD 3-15-90. RJ) (JUDGE KENYON) (Dkt'd 11/07/89).

11/09/89 230 –(APPL #2) (FLD 9TH CIR TI SCH-ED: TRANSC WILL BE ORD FR THE CRT RPTER 11-21-89, CRT RPTER'S TRANSC WILL BE FLD 12-21-89, AP-PELLANT'S OPENING BRIEF & EX-CERPTS OF RC WILL BE SERVED & FLD 1-30-89, APPELLEE WILL BE SERVED & FLD 3-1-90 & THE OPT REPLY BRIEF OF APPELLANT WILL BE SERVED & FLD 3-15-90. KKG) (Dkt'd 11/20/89).

231 Motion for bail pending appeal filed (MOT #44) (FLD AMENDED NOTC OF HEARING RE: BAIL. KKG) (Dkt'd 11/20/89).

231 Motion for bail pending appeal hearing set for 11/20/89 @ 2:00 PM (MOT #44) (JUDGE KENYON) (Dkt'd 11/20/89).

11/13/89 234 –(APPL #2) (FLD TRANSC DESIGN ND ORD FORM HRG DATE 4-12-89. RJ) (JUDGE KENYON) (Dkt'd 12/07/89).

11/15/89 232 Filed memorandum in opposition to motion for bail pending appeal (MOT #44) (Dkt'd 11/20/89).

11/17/89 235 Reply to answer to motion for bail pending appeal (MOT #43) (FLD DFT

GOTTESMAN RESPONT GOVTS OPPOS TO MOTN FOR BAIL PENDING APPEAL. RJ) (JUDGE KENYON) (Dkt'd 12/11/89).

11/20/89 233 Motion for bail pending appeal hearing held (MOT #44) (CRT GRANTS BAIL PENDING APPEAL. PRESENT BND SHALL REMAIN AS BND ON APPEAL. RJ) (JUDGE KENYON) (Dkt'd 12/06/89).

233 Motion for bail pending appeal granted (MOT #44) (CRT GRANTS BAIL PENDING APPEAL. PRESENT BND SHALL REMAIN AS BND ON APPEAL. RJ) (JUDGE KENYON) (Dkt'd 12/07/89).

233 Bail to stand as bail on appeal (CRT GRANCRT GRANTS BAIL PENDING APPEAL PRESENT BND SHALL REMAIN AS BND ON APPEAL. RJ) (JUDGE KENYON) (Dkt'd 12/07/89).

12/15/89 236 Bond exonerated (Dkt'd 12/15/89).

12/27/89 237 —FLD EX PARTE APPLIC FOR PERMISSION TO LE THE DIST TO ATTEND CONSUMER ELECTRONICS CONVETION. RJ (JUDGE KENYON) (Dkt'd 01/05/90).

03/01/90 239 —(APPL #2) (LODGED ORD FRM THE 9TH CIR APPEALS. CRT REPTR ROBERT L. CIPOLLONI'S MOT FOR AN EXTN OF TIME TO FILE THE TRANSC IS GRANTED. THE

TRANSC IS DUE 3-1-90. THE BRIEF SCHED IS AS FOLLOWS: APPELLANTS OPENING BRIEF AND EXCERPTS OF RECROD SHALL BE DUE 4-10-90, APPELLEES BRIEF IS DUE 5-10-90, AND THE OPTIONAL REPLY BREIF SHALL BE DUE 5-24-90. RJ) (JUDGE KENYON) (Dkt'd 03/16/90).

240 Motion filed (MOT #45) (FLD MOT, PURS TO NINTH CIR ORD, TO REOPEN PROCEEDINGS FOR RECONSIDERATION IN LIGHT OF INTERVENING CIR CRT DECISION AND MEMO IN SUPPT. RJ DATE OF HRG 3-26-90 AT 1:30 P.M.) (JUDGE KENYON) (Dkt'd 03/16/90).

241 Motion for bail pending appeal filed (MOT #46) (FLD MOT TO MODIFY BAIL TO REL PROPERTY WHICH PRESENTLY SECURES BAIL PENDING APPEAL. DATE OF RG 3-26-90 AT 1:30 P.M. RJ) (JUDGE KENYON) (Dkt'd 03/16/90).

03/16/90 242 Filed memorandum in opposition to motion (MOT #45) (FLD GOVTS OPOS TO DFT GOTTESMANS MOT TO REOPEN PROCEEDINGS FOR RECONSIDERATION IN LIGHT OF A RECENT NINTH CIR OPINION MEMO OF P/A. DATE OF HRG 3-26-90 AT 1:30 P.M. RJ) (JUDGE KENYON) (Dkt'd 03/29/90).

03/21/90	246	—(APPL #2) (LODGED ORD FRM 9TH CIR APPEAL APPELLANTS MOT TO SAY BRIEFING IS GRANTED. ON OR BEFORE 4-2-90, RJ) (JUDGE KENYON) (Dkt'd 04/05/90).
03/22/90	243	Filed reply to answer to motion (MOT #45) (FLD DFTS REPLY TO GOVTS OPPOS TO DFT GOTTESMANS MOT TO REOPEN PROCEEDINGS. DATE OF HRG 3-26-90 AT 1:30 P.M. RJ) (JUDGE KENYON) (Dkt'd 03/29/90).
03/26/90	244	Status hearing held (CRT GRANTS DFTS MOT TO MOD BAIL CRT HEARS ARGUMENT OF CNSL CRT TAKES DFTS MOT TO REOPEN PROCEEDINGS UNDER SUBMISSION. RJ) (JUDGE KENYON) (Dkt'd 03/30/90).
		Motion for bail pending appeal granted (MOT #46) (JUDGE KENYON) (Dkt'd 03/30/90).
	245	Order conditions of bond modified (IT IS ORD BAIL PENDING APPEAL SHALL CONSIST OF THE SUM OF 17,500, WHICH SUM IS NOW HELD BY THE CLK OF THE CERT. THE CLK OF THE CRT IS ORD TO SIGN THE REQUEST FOR FULL RECONVEYANCE SET FORT AT THE END OF THE DEED OF TRUST EXECUTED BY RUBIN GOTTESMAN AND BARBARA GOTTESMAN ON 5-9-88 AND DELIVER SAID REQUEST FOR FULL RECONVEYANCE TO DFT RUBIN GOTTESMAN TOGETHER W/THE ORIG DEED OF TRUST AND NOTE IN THE SUM OF 175,000 MADE PAYABLE TO THE CLK, U.S. DIST CRT CD. RJ PULLED DEED OF TRUST AND SENT PAPER WORK TO ADMIN. RJ) (JUDGE KENYON) (Dkt'd 03/30/90).
03/30/90	255	Bond (RCVD RECEIPT FOR CERT MAIL SIGNED AND RETND. PROPERTY ADDRESS 7116 DECEIS PLACE, VAN NUYS. PROPERTY OWNER RUBIN GOTTESMA AND BARBARA GOTTESMAN. RJ) (Dkt'd 05/30/90).
04/02/90	247	Status hearing held (PURS TO DFTS MT TO REOPEN PROCEEDINGS, THE CRT REQUESTS BRIEFING ON THE ISSUE OF WHETHER 18:2252 IS CONSTITUTIONAL IN LIGHT OF U.S. V. THOMAS, NO. 88-5325, SLIP OP. 299 (9TH CIR JAN. 10, 1990) AND IN PARTICULAR, WHETHER THE STATUTE IS CONSTITIONAL AS APPLIED BY THIS CRT TO DFTS. THE CRT FEELS THAT NO HRG IS REQUIRED. THE EXPECTS TO RULE ON THE PAPERS. SUCH PAPERS SHOULD BE FLD NLT 4-23-90. RJ) (JUDGE KENYON) (Dkt'd 04/05/90).

04/09/90	251	Order filed (IT IS ORD THAT RUBIN GOTTESMAN MAY TRAVEL TO TEXAS FRM 4-14-90 TO 4-16-90. RJ) (JUDGE KENYON) (Dkt'd 05/10/90).
		Bond (IT IS ORD THAT RUBIN GOTTESMAN MAY TRAVEL TO TEXAS FRM 4-14-90 AT 4-16-90. RJ) (JUDGE KENYON) (Dkt'd 05/10/90).
	252	–FLD DFT GOTTESMANS EX PARTE APPLIC FOR LE TO TRAVEL. LODGE ORD. RJ (JUDGE KENYON) (Dkt'd 05/10/90).
04/10/90	253	–LODGED ORD FRM 9TH CIR APPEAL. CRT REPTR ROBERT CIPOLLONIS MOTN FOR A EXTN OF TI TO FILE THE TRANS IS GRANTED. THE TRANSC IS DUE 4-30-90. A NEW BRIEFING SCHED WILL BE ESTABLISHED, IF APPROPRIATE, UPON THE CRTS ACTN OR APPELLANTS RESPONSE TO THE 3-14-90. RJ (JUDGE KENYON) (Dkt'd 05/10/90).
04/11/90	248	–FLD DFTS MEMO PURS TO CRT ORD DATED 4-2-90 ORAL ARUGMENT REQUESTED. RJ (JUDGE KENYON) (Dkt'd 04/20/90).
04/23/90	254	–FLD GOVTS MEMO PURS TO CRT ORD DATED 4-2-90. RJ (JUDGE KENYON) (Dkt'd 05/10/90).
04/30/90	249	Status hearing held (FILING AND SPREADING MANDATE OF THE NINTH CIR CRT OF APPEALS IN

		CHAMBERS THE CRT ORDS THAT THE MANDATE OF THE 9TH CIR CRT OF APPEAL LIMITED REMANDING. ENT 5-9-90. RJ) (JUDGE KENYON) (Dkt'd 05/09/90).
	250	Filed true copy of order of U.S.C.A. that the appeal (APPL #2) be granted and action remanded to District Court for further proceedings. (FLD ORD FRM 9TH CIR APPEAL. APPELLANTS RENEWED MOTN FOR A LIMITED REMAND IS GRATED. THIS CASE IS REMANDED TO THE DIST COURT FOR THE LIMITED PURPOSE OF ENABLING THAT CRT TO ENTERTAIN A MOTN TO REOPEN PROCEEDINGS. THE PARTIES SHALL SUBMIT A JOINT STATUS REPT WITHIN 45 DAYS OF THE DATE OF THIS ORD. ENT 5-9-90 RJ) (JUDGE KENYON) (Dkt'd 05/09/90).
06/29/90	257	Order filed (FLD ORD RE CONSTITUTIONALITY OF 18:2252. SM) (JUDGE KENYON) (Dkt'd 07/06/90).
07/05/90	258	Order filed (LODGED ORD FRM USCCA, THIS CRT HAS RECEIVED AND REVIEWED APPELLANT'S STATUS REPORT. THIS APPEALS IS STYD FOR 60 DAYS. THE PARTIES SHALL SUBMIT A SECND JOINT STATUS REPORT W/IN 60 DAYS OF THIS ORD. SM) (Dkt'd 07/06/90).

07/25/90	259	–FLD EX PARTE APPLIC FOR PERMISSION TO LEAVE THE DIST TO ATTEND VIDEO SOFT WEAR DEALERS ASSOC SHOW. LODGED ORD. RJ (JUDGE KENYON) (Dkt'd 08/02/90).
07/31/90	260	–FLD DECLAR OF STANLEY FLEISHMAN IN SUPPT OF EX PARTE APPLIC FOR ORD FOR PERMISSION TO LE THE DIST. RJ (Dkt'd 08/02/90).
08/01/90	261	Order conditions of bond modified (IT IS ORD THAT DFT RUBIN GOTTESMAN MAY LE THE DIST FOR THE PEIROD 8-4-90 THROUGH 8-7-90. RJ) (JUDGE KENYON) (Dkt'd 08/09/90).
08/03/90	262	–LODGED ORD FRM 9TH CIR CRT OF APPEAL. ON 6-11-90 THIS CRT GRANTD CRT REPTR ROBERT L. CIPOLLONI'S THIRD MOTN FOR AN EXTNOF TIME UNTIL 6-20-90, TO FILE THE TRANSC. THE CRT FUR DIRECTED APPELLANTS TO INFORM THIS CRT BY LTR AS TO WHETHER THE CRT REPTR COMPLIED WITH THE ORD. ON 7-9-90, THE CRT RECVD APPELLANTS REPT. THE REPT STATES ONLY THAT APPELLANTS HAVE NOT YE RECVD THEIR CPY OF THE TRANSC THE CRT ASSUMES THAT THE REPTR HAS NOT COMPLETED OR FILED THE TRANSC. RJ (Dkt'd 08/09/90).

08/17/90	263	–FLD EX PARTE APPLIC FOR PERMISSION TOLE THE DIST FOR ONE DAY FOR A BUSINESS MEETING IN LAS VEGAS, NEVADA AND DECLAR OF STANLEY FLEISHMAN IN SUPPORT. LODGED ORD. RJ (JUDGE KENYON) (Dkt'd 08/30/90).
08/20/90	264	Order conditions of bond modified (ITIS ORD THAT DF RUBIN GOTTESMAN MAY LE THE DIST FOR THE PERIOD 8-25,26 TO ATTEND BUSINESS IN LAS VEGAS, NEVADA. RJ) (JUDGE KENYON) (Dkt'd 08/30/90).
10/01/90	265	–FLD RECEIPT FOR REPTRS TRANSC DATE OF HRG. 4-12-89. RJ (JUDGE KENYON) (Dkt'd 10/16/90).
12/17/90	266	–FLD EX PARTE APPLIC FOR PERMISSION TO LE THE DISTRICT FOR A BUSINESS MEETING IN LAS VEGAS, NEVADA AND DECLAR OF STANTLEY FLEISHMAN IN SUPPORT. LODGED ORD. RJ (JUDGE KENYON) (Dkt'd 01/08/91).
12/27/90	267	Bond (AS OF 2-5-91 WE ARE UNABLE TO PROVIDE INFORMATION AS TO THE ABOVE DFT. SPOKE WITH PAUL LEVFEBVRE FRM BOP ON 2-5-91. RJ) (Dkt'd 02/20/91).
	268	Order conditions of bond modified (FLD ORD GRANTING PERM TO LEAVE THE DISTRICT JANUARY

		9-14, 1991. KKG) (JUDGE KENYON) (Dkt'd 02/08/91).
04/05/91	269	–FLD RECEIPT FOR REPTRS TRANSC DATE OF HRG 4-17-89, 4-19-89. RJ (JUDGE KENYON) (Dkt'd 05/03/91).
04/25/91	270	–FLD RECEIPT FOR REPTRS TRANSC DATE OF HRG 4-13-89. RJ (JUDGE KENYON) (Dkt'd 05/03/91).
05/10/91	271	–LODGED ORD FRM 9TH CIR CRT OF APPEALS. THE CRT REPTR ROBERT CIPOLLONI'S MOTN FOR AN EXTN OF TI TO FILE THE TRANSC IS GRANTED. THE TRANS IS DUE 5-15-91. NO FUR EXTN OF TI TO FILE THE TRANS WILL BE GRANTED. RJ (JUDGE KENYON) (Dkt'd 05/20/91).
05/28/91	273	–FLD EX PARTE APPLIC FOR PERMISSION TO ATTEND TRADE CONVENTION AND BUSINESS AFFAIRS DECLAR OF STANLEY FLEISHMAN IN SUPPORT. LODGED ORD. RJ (JUDGE KENYON) (Dkt'd 06/07/91).
05/29/91	274	Order filed (IT IS ORD THAT RUBING GOTTESMAN MAY LE THE DIST ON 6-12-91 TO ATTEND BUSINESS IN ALBUQUERQUE, NEW MEXICO AND MAY LE THE DIST FRM 7-12-91 TO 7-15-91 TO ATTEND THE CONSUMER ELECTRONICS SHOW IN LAS VEGAS, NEVADA. RJ) (JUDGE KENYON) (Dkt'd 06/07/91).

		Bond (IT IS ORD THAT RUBIN GOTTESMAN MAY LE THE DIST ON 6-12-91 TO ATTEND BUSINESS IN ALBUQUERQUE, NEW MEXICO AND MAY LE THE DIST FRM 7-12 TO 7-15-91 TO ATTEND THE CONSUMER ELECTRONICS SHOW IN LAS VEGAS, NEVADA. RJ) (JUDGE KENYON) (Dkt'd 06/07/91).
11/01/91		Payment, $100.00 (REC'D THE SUM OF 100.00 FOR ROBERT CIPOLLONI FOR SANC ORD DTD 6-7-91. KR) (Dkt'd 11/19/91).
	225	Dismissed on government's motion (Counts 9, 10, 11) (CTS SHOULD HV BEEN DISM AT THE TI OF SENT WH WAS HELD ON 1-23-89. KKG) (JUDGE KENYON) (Dkt'd 01/27/92).
4/9/92	–	BASE TRANSFERRED FROM DEC-10, refer to criminal microfiche for previous docket entries (mr) [Entry date 08/05/92]
4/10/92	280	FlD EX PARTE Applic by dft Rubin Gottesman for an ord perm dft to leave dist from 5/3/92 to 5/25/92, decl of Rubin Gottesman to leave dist from 5/3/92 to 5/25/92, decl of Rubin Gottesman and Stanley Fleishman (mr) [Entry date 08/05/92]
4/15/92	281	Fld ORDER by Judge David V. Kenyon: modifying conditions of release as to Rubin Gottesman. Appellant Rubin Gottesman may leave dist from 5/3 to

		5/25/92 to attend Cannes Int'l Film Festival in Europe. Clk of Crt is ord to deliver Rubin Gottesman his passport by delivering the sme to his atty Stanley Fleishman or to Mr. Gottesman. Passport must be picked up by either of them at the Crthouse. Rubin Gottesman is ord to retn to L.A., CA nlt 5/25/92. Rubin Gottesman is ord to deliv his passport to clk of crt on or bf 6/1/92. (mc) [Entry date 08/05/92]
4/21/92	282	Fld NOTICE of deliv of passport to Rubin Gottesman on 4/21/92 (mc) [Entry date 08/05/92]
6/1/92	283	Fld NOTICE as to dft Rubin Gottesman of deliv of passport back to crt. Passport no. 031392190. Sent to clk (mc) [Entry date 08/05/92]
6/25/92	284	Fld letter from U.S. Dept of State re lockout ord as to Rubin Gottesman passport services. (mc) [Entry date 08/05/92]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 89-50562

UNITED STATES OF AMERICA, APPELLEE

v.

RUBIN GOTTESMAN, DEFENDANT-APPELLANT

DOCKET ENTRIES

11/13/89	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 11/9/89; (RT required: y) (Sentence imp 12 months) [89-50562] transcript shall be ordered by 11/21/89 for Rubin Gottesman; Fee payment due 11/27/89; transcript shall be filed by 12/21/89; appellants' briefs, excerpts due by 1/30/90 for Rubin Gottesman; appellees' brief due 3/1/90 for USA; appellants' reply brief due by 3/15/90 for Rubin Gottesman. (kn) [89-50562]
1/31/90	Filed Appellant X-Citement Video & Rubin Gottesman's motion to consolidate cases 89-50556 & 89-50562 and to extend time to file appellant's opening brief. (1/30) (CRIMATT) [89-50556, 89-50562] [1711315] [89-50556, 89-50562] (jlc) [89-50556 89-50562]
1/31/90	Filed Appellant X-Citement Video & Rubin Gottesman's motion to remand case to lower court for reconsideration in light of intervening circuit court decision. (1/30) (CRIMATT) [89-50556, 89-50562] [1711315] [89-50556, 89-50562] (jlc) [89-50556 89-50562]

2/1/90 Received notification from District Court of payment of docket fee (date paid: 1/31/90) [89-50562] (jhc) [89-50562]

2/6/90 Filed ct rpt Robert L. Cipolloni mtn for ext of time until 3/1/90 in which to file rt [1719396] (PROMO) [89-50562] (rc) [89-50562]

2/21/90 Filed order (SCHROEDER, FERNANDEZ) appellant's motion for a limited remand is denied without prejudice to its renewal following an an indication that the DC is willing to reopen proceedings. Aplt's motion to consolidate appeal nos. 89-50556 & 89-50562 is granted. [89-50556, 89-50562] (jlc) [89-50556 89-50562]

2/22/90 Filed order (Deputy Clerk: cb) Ct Rpt Robert L. Cipollon's mtn for an ext of time to file the transcript is granted. The transcript is due 3/1/90. This order does not waive the mandatory fee reduction for any portion of the transcripts delivered late. See Report of the Proceedings of the Judicial Conference of the US, March 1982, page 10. The briefing schedule is as follows: aplts' opening brief(s) and excerpts of record shall be due 4/10/90, aple's brief is due 5/10/90, and the optional reply brief(s) shall be due 5/24/90. This order is subject . . . [89-50556, 89-50562] (rc) [89-50556 89-50562]

3/14/90 Filed motion of Appellants to reconsider briefing schedule and deputy clerk order: (Deputy Clerk: cb) aplts' motion to stay briefing schedule is granted. On or before 4/2/90, aplts shall submit their renewed motion for limited remand or shall submit a report on the status of their request to the DC. A new schedule will

be established, if appropriate, upon the court's review of aplts' response to this order. (Motion recvd 3/5) [89-50556, 89-50562] (jlc) [89-50556 89-50562]

4/3/90 Filed motion of extend time to file Reporter's Transcript and deputy clerk order: (Deputy Clerk: cb) Ct. Rptr. Robert Cipolloni's motion for an ext. of time to file the transc. is granted. The transc. is due 4/30/90. This order does not waive the mandatory fee reduction for any portion of the transc. delivered late. A new briefing schedule will be established if appropriate, upon the court's action or aplt's response to the 3/14/90 order. in 89-50556, (Motion recvd 3/27) [89-50556, 89-50562] (jlc) [89-50556 89-50562]

4/9/90 Filed Appellant X-Citement Video in 89-50556, Appellant Rubin Gottesman in 89-50562's motion to remand case to lower court for reconsideration in light of intervening circuit court decision. (4/5) (CRIMATT) [89-50556, 89-50562] [1741120] [89-50556, 89-50562] (jlc) [89-50556 89-50562]

4/19/90 Filed order (BROWNING, BRUNETTI,): aplts' renewed mtn for a limited remand is granted. This case is remanded to the dc for the limited purpose of enabling that court to entertain a mtn to reopen proceedings. The parties shall submit a joint status report within 45 days of the date of this order. [89-50556, 89-50562] (dmd) [89-50556 89-50562]

4/19/90 Filed order (BROWNING, BRUNETTI,): aplts' renewed mtn for a limited remand is granted. This case is remanded to the dc for

the limited purpose of enabling that court to entertain a mtn to reopen proceedings. The parties shall submit a joint status report within 45 days of the date of this order. [89-50556, 89-50562] (dmd) [89-50556 89-50562]

6/8/90 Filed aplts' amended status report (pursuant to 4/19/90 order) (CRIMATT), served on 6/5/90. [89-50562, 89-50556] (rc) [89-50556 89-50562]

6/8/90 Filed aplts' status report (pursuant to 4/19/90 order) (CRIMATT), served on 6/5/90. [89-50562, 89-50556] (rc) [89-50556 89-50562]

6/11/90 Filed motion of extend time to file Reporter's Transcript and deputy clerk order: (Deputy Clerk: mlm) Ct. Rptr. Robert L. Cipolloni's 3rd motion for an ext. of time to file the transc. is granted. The transc. is due 6/29/90. Aplt shall inform this court by letter as to whether the rptr. complies with this order in a timely fashion. This order does not waive the mandatory fee reduction for any portion of the transc. delivered late. in 89-50562 (Motion recvd 5/30) [89-50556, 89-50562] (jlc) [89-50556 89-50562]

6/27/90 Filed order (CANBY, WIGGINS): this court has received & reviewed aplt's status report. This appeal is stayed for 60 days. The parties shall submit a second joint status report within 60 days of this order. [89-50556, 89-50562] (jlc) [89-50556 89-50562]

7/9/90 Filed aplt's response to 6/11/90 order re: reporter's transcript not yet recvd. (work in progress—Promo) [89-50562, 89-50556] (dmd) [89-50556 89-50562]

7/30/90 Filed order (Deputy Clerk: HW) pm 6/11/90, this court granted Ct. Rptr. Robert L. Cipolloni's third motion for an ext. of time until 6/29/90, to file the transc. The court further directed aplts to inform this court by letter as to whether the ct. rptr. complied with the order. On 7/9/90. the court received aplts' report. The report states only that aplts have not yet received their copy of the transc.; the court assumes that the rptr. has not completed or filed the transc. Within 14 days from the entry of this order, Ct. Rptr Cipolloni shall (1) file the transc. or (2) move for an ext. of time to do so. Aplt shall inform this court by letter whether the original transc. have been filed with the DC. Aplts are reminded that pursuant to FRAP 25(d), all papers presented for filing in this court must be accompanied by proof of service on all parties. This order shall be provided to the rptr. at the DC; copies of this order shall be provided to the DC clerk and the ct. rptr. supervisor. [89-50556, 89-50562] (jlc) [89-50556 89-50562]

8/27/90 Received Appellant X-Citement Video in 89-50556 letter dated 8/17 re: "no record of filing of transcripts . . ." (no action necessary per PROMO) [89-50556, 89-50562] (jlc) [89-50556 89-50562]

8/31/90 Filed ct. rptr. mtn & order (Dpty clk-ra) Ct. Rptr. Robert Cipolloni's mtn for an ext. time to file the transcript is granted. The transcript is due 9/17/90. This order does not waive the mandatory fee reduction for any portion of the transcripts delivered late. . . [89-50556, 89-50562] (dmd) [89-50556 89-50562]

10/1/90 Filed Ct. Rptr. Robert L. Cipolloni's motion to extend time to file Reporter's Transcript until 11/15/90 served on 9/24/90. (no action necessary per PROMO) [89-50556, 89-50562] (jlc) [89-50556 89-50562]

5/2/91 Filed motion and order (Deputy Clerk: cb) ct reorte Robert Cipolloni's mtn for an ext of time to file the transcript is granted. The transcript is due 5/15/91. Nom further e t of time to file the transcript will be granted. This order does not waive the mandatory fee reduction for any portion of the transcripts delivered late. See Report of The proceedings of the Judicial Conference of the US. . . . This order shall be provided to the reporter at the DC. A new schedule will be established, if appropriate, upon review of aplts' response to the order to show cause. This order is subject to . . . in 89-50556, 89-50562 (Motion recvd 4/29/91) [89-50556, 89-50562] (rc) [89-50556 89-50562]

5/2/91 Filed order (Deputy Clerk: cb) on 6/27/90, the court stayed proceedings in these appeals and instructed aplts to file a status report on or before 8/2/91. Court records do not reflect the filing of the report. Within 14 days from the entry of this order, aplts shall file the report and shall each pay $250 to the clk as a sanction or show cause why such a fine would be unwarranted. A new schedule will be established, if appropriate, upon review of aplts' response. Failure to respond to this order in a timely rfashion will subject these appeals to dismissal under 9th Cir. 42-1. response to order to show cause due 5/17/91 in 89-50556, in 89-50562;

[89-50556, 89-50562] (dmd) [89-50556 89-50562]

5/7/91 Filed defts/aplts response to order to show cause w/exhibit (5/6) (CRIMATT) [89-50556, 89-50562] (REFERRED TO MERITS PNAEL;—copies to casefile) (dmd) [89-50556 89-50562]

6/7/91 Filed order (Joseph T. SNEED,): . . . text . . . within 14 days from the entry of this order, the reporter shall show cause in writing why he should not be sanctioned for excessive delay in filing the transcripts. . . . Appellants' response to the clk's order to show cause shall be REFERRED TO THE MERITS PANEL for a determination as to the propriety of sanctions. Briefing shall proceed as follows: opening brief due 7/29/91; answering brief due 8/28/91; reply brief due 14 days from service of answering brief. (Certified: p 497 119 118: Robert Cipolloni c/o USDC-CAC) [89-50556, 89-50562] (ckp) [89-50556 89-50562]

7/26/91 10 day oral extension by phone of time to file Appellant in 89-50556, Appellant in 89-50562 brief. [89-50556, 89-50562] appellants' brief due 8/8/91; appellees' brief due 9/9/91; appellants' reply brief due 14 days from service of answering brief. (ra) [89-50556 89-50562]

8/13/91 filed aplt's opening brief (47 pgs) original + 15 copies + 5 excerpts of record (8/8) [89-50556, 89-50562] (dmd) [89-50556 89-50562]

8/20/91 Filed aplt's mtn to take judicial notice of declarations set forth in the supplement to the record (8/8) [89-50556, 89-50562] [1983006] [89-50556, 89-50562] (dmd) [89-50556 89-50562]

8/20/91 Recvd aplts' supplement to the record in 5 vols (mtn pending) [89-50556, 89-50562] (REFERRED TO MERITS PANEL) (dmd) [89-50556 89-50562]

8/23/91 Received aplts erratum (8/20) (CRIMATT) [89-50556, 89-50562] (ckp) [89-50556 89-50562]

8/23/91 Received def-aplt (Gottesman) erratum (8/20) no action necessary per ahh casefile [89-50556, 89-50562] (ckp) [89-50556 89-50562]

8/27/91 Filed motion & order (Deputy Clk: ah) aple's motion for an extension of time in which to file the answering brief is granted. The answering brief is due 10/10/91. The optional reply brief is due 14 days from service of the answering brief. No further extension of time to file this brief will be granted absent the showing of extraordinary circumstance required under Ninth Cir. R. 31-2.3(c). Aplt's request for judicial notice of the declarations filed in . . . (cite) . . . 713 F. Supp. 469 (D.D.C. 1989) and any related filings are REFERRED TO THE MERITS PANEL for disposition. The parties are reminded that such disposition will not take place until briefing is complete and the cs i calendared. in 89-50556, 89-50562 (Motion recvd 8/22/91) [89-50556, 89-50562] (ckp) [89-50556 89-50562]

9/3/91 Filed order (Joseph T. SNEED,): . . . the reporter is granted one final opportunity to show cause why he should not be sanctioned for his excessive delay in the preparation of these transcripts. The response shall be filed within 14 days from the entry of this order. If

the reporter does not respond within the noted time period, a fine will be imposed without further notice. (Certified: P 497 119 091 – c/o Donna Stephenson) [89-50556, 89-50562] (dmd) [89-50556 89-50562]

9/16/91 Received ERRATUM pursuant to a telephone conversation with Adrianne Hickman copies s/b enclosed in the brief (RECORDS) [89-50556, 89-50562] (ckp) [89-50556 89-50562]

9/18/91 Filed Ct Rpter Robert Cipolloni's response to order to show cause (PROMO, work in progress) [89-50556, 89-50562] (rc) [89-50556 89-50562]

10/15/91 Filed original and 15 copies appellee USA in 89-50556's 33 pages brief, 5 supplemental Exc. 1 vols: ; served on 10/10/91 [89-50556, 89-50562] (ckp) [89-50556 89-50562]

10/15/91 Filed aple's motion to strike aplt's supplement to record (10/10) (CRIMAT) [89-50556, 89-50562] [2012142] (ckp) [89-50556 89-50562]

10/15/91 Filed aple's motion to strike part of aplt's sup to record [89-50556, 89-50562] served on 10/10/91 [2028649] submit to PROMO PER CRIMAT (ckp) [89-50556 89-50562]

10/16/91 Filed order (Joseph T. SNEED, Cecil F. POOLE,): on 6/7/91, Court Reporter Robert Cipolloni was ordered to show cause as to why sanctions should not be impsoed for his excessive delay in the filing of the transcripts for these appeals. Although the reporter appeared to have filed the transcripts, court records did not reflect that the reporter has responded to

the 6/7 order. On 9/3/91, the reporter was granted one final opportunity to show cause why he should not be sanctioned for his excessive delay in the preparation of these transcripts. The court has determined that the response does not fully discharge the previous orders to show cause. Reporter Cipolloni is hereby fined $100. This sanction is imposed as a judgment, and shall be paid to the clerk of this court within 14 days from the entry of this order. If the reporter does not paid the fine in a timely fashion, the judgment will be referred to the United States Attorney for collection. If the reporter causes similar delays in the future or fails to respond to court orders, larger fines will be imposed. This order shall be transmitted to the reporter via certified mail in care of the court reporter supervisor; copies of this order shall be provided to the chief district judge, the district judge, the district court clerk and the court reporter supervisor. (P 497 119 074) [89-50556, 89-50562] (ckp) [89-50556 89-50562]

10/25/91 10 day oral extension by phone of time to file Appellant in 89-50556, Appellant in 89-50562's reply brief. [89-50556, 89-50562] appellants' reply brief due 11/18/91 in 89-50556, in 89-50562; (ah) [89-50556 89-50562]

11/13/91 Filed aplts' reply to government's motion to strike aplts supplement to record. [2012142-1] in 89-50556, 89-50562; served on 11/6/91 [89-50556, 89-50562] (ckp) [89-50556 89-50562]

11/13/91 Filed original and 15 copies reply brief, (Informal: no) 21 pages; served on 11/6/91 [89-50556, 89-50562] (ckp) [89-50556 89-50562]

12/9/91 Filed motion & order (Deputy Clk: ahh) aple's motion to strike aplt's supplement to the record is denied as moot. Aple is referred to the 8/27/91 order which refers aplt's request for judicial notice to the merits panel. Until the MERITS PANEL has determined whether the material is appropriate for notice it is not part of the record. [2035933-1] in 89-50556, 89-50562 (Motion recvd 10/15/91) [89-50556, 89-50562] (ckp) [89-50556 89-50562]

1/2/92 Calendar check performed [89-50556, 89-50562] (th) [89-50556 89-50562]

1/16/92 Calendar materials being prepared. [89-50556, 89-50562] [89-50556, 89-50562] (th) [89-50556 89-50562]

1/21/92 CALENDARED: Pasadena 3/5/92 9:00 a.m. Courtroom 3 [89-50556, 89-50562] (th) [89-50556 89-50562]

1/21/92 Received X-Citement Video additional citations, served on 1/14/92 (PANEL) [89-50556, 89-50562] (ckp) [89-50556 89-50562]

2/7/92 Filed order (Deputy Clerk: aw) the request of aplt that the court take judicial notice of materials in the supplement of record is denied. [1983006-1] in 89-50556, 89-50562 [89-50556, 89-50562] (ckp) [89-50556 89-50562]

2/10/92 Received Stanley Fleishman letter dated 2/7/92 re: acts in this case violates the free

	speech and press press provisions of the First Amendment (PANEL) [89-50556, 89-50562] (ckp) [89-50556 89-50562]
3/5/92	ARGUED AND SUBMITTED TO William C. CANBY, Alex KOZINSKI, Ferdinand F. FERNANDEZ [89-50556, 89-50562] (lu) [89-50556 89-50562]
3/5/92	Received USA in 89-50556, USA in 89-50562 additional citations, served on 3/5/92. (panel) [89-50556, 89-50562] (lu) [89-50556 89-50562]
3/16/92	Received Stanley Fleishman additional citations, served on 3/10/92 (PANEL) [89-50556, 89-50562] (ckp) [89-50556 89-50562]
4/23/92	Sent letter to United States Attorney, Central District re: collection of 10/16 sanction [89-50556, 89-50562] (cb) [89-50556 89-50562]
7/22/92	Received letter dated 7/22/92 from Barry Levin, Office of United States Attorney re: court reporter paid sanction to district court [89-50556, 89-50562] (cb) [89-50556 89-50562]
8/4/92	Sent letter to Barry Levine re: given payment of fine to district court, collection efforts may be deemed concluded [89-50556, 89-50562] (cb) [89-50556 89-50562]
9/25/92	Received Stanley Fleishman letter dated 9/22/92 re: the Missouri statute restricting the rental or sale of videocassettes. (PANEL) [89-50556, 89-50562] (ckp) [89-50556 89-50562]
10/5/92	Received Stanley Fleishman additional citations, "The Disturbing Photography of Sally Mann" (PANEL) [89-50556, 89-50562] (ckp) [89-50556 89-50562]

12/16/92	FILED OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. William C. CANBY, author; Alex KOZINSKI, dissenting; Ferdinand F. FERNANDEZ.) FILED AND ENTERED JUDGMENT. [89-50556, 89-50562] (ck) [89-50556 89-50562]
1/5/93	Filed deputy clerk order: (Deputy Clerk: tsp) granting motion & order to extend time to file a petition for rehearing and petition for rehearing en banc. The petition for rehearing due 1/27/93 in 89-50556, in 89-50562; in 89-50556, 89-50562 (Motion recvd 12/23/92) [89-50556, 89-50562] (tsp) [89-50556 89-50562]
1/27/93	[2285953] Filed original and 40 copies aple's petition for rehearing with suggestion for rehearing en banc. (PANEL AND ALL ACTIVE JUDGES) 15 p.pages, served on 1/26/93 [89-50556, 89-50562] (rc) [89-50556 89-50562]
5/4/93	Filed order (William C. CANBY, Alex KOZINSKI, Ferdinand F. FERNANDEZ,): The ct orders a response to the petition for rehearing; it shall be filed by 5/14/93. [89-50556, 89-50562] (tsp) [89-50556 89-50562]
5/17/93	Filed Appellant X-Citement Video and Rubin Gottesman response to petition for rhearing pursuant to ct order served on 5/14/93 (PANEL & EN BANC COURT) [89-50556, 89-50562] (tsp) [89-50556 89-50562]
7/9/93	Filed order (William C. CANBY, Alex KOZINSKI, Ferdinand F. FERNANDEZ) . . . The petition for rehearing is denied and

the suggestion for rehearing en banc is rejected. [2285953-1] (Note: for complete text see order) [89-50556, 89-50562] (rc) [89-50556 89-50562]

7/16/93 Filed aple's mtn to stay mdt pending application for writ o certiorari; declaration of Miriam A. Krinsky. (Lead W.C) [89-50556, 89-50562] served on 7/15/93 [2391972] (rc) [89-50556 89-50562]

7/23/93 Filed order (William C. CANBY, Alex KOZINSKI, Ferdinand F. FERNANDEZ,): The mot of pltf-aple to stay the mandate is granted. The mandate is stayed for 30 days from the date of the filing of this order, if, within that time, the clk of this court is notified by the clk of the Supreme Ct of the US that a petition for cert has been filed, then the mandate is further stayed until the final disposition of the matter by the Supreme Ccourt. in 89-50562 [89-50556, 89-50562] (tsp) [89-50556 89-50562]

8/23/93 Filed Aple motion for additional thirty days to stay the mandate. (lead W.C) served on 8/20/93 [89-50556, 89-50562] (gva) [89-50556 89-50562]

8/31/93 Filed order (William C. CANBY, Alex KOZINSKI, Ferdinand F. FERNANDEZ,): The mot of pltf-aple to stay the mandate for an additional 30 days is granted. The mandate is stayed for additional 30 days from the date of the filing of this order. If, within that time, the clk of this ct is notified by the clk of the supreme ct that a petition for cert has been filed, then the mandate is further stayed until

the final disposition of the matter by the Supreme Ct. [89-50556, 89-50562] (tsp) [89-50556 89-50562]

9/29/93 Filed USA in 89-50556, USA in 89-50562 motion to stay the mandate until 11/6/93 or pet for cert filed. (PANEL) [89-50556, 89-50562] served on 9/24/93 [2436038] (ah) [89-50556 89-50562]

10/8/93 Filed order (William C. CANBY, Alex KOZINSKI, Ferdinand F. FERNANDEZ) the mtn of pltf-aple to stay the mandate until 11/6/93 is GRANTED. The mandate is stayed until 11/6/93 or until the Clk of this Ct is notified by the Clk of the Supreme Ct of the U.S. that a petition for cert has been filed, then the mandate is further stayed until the final disposition of the matter by the Supreme Ct. [2436038-1] [89-50556, 89-50562] (rc) [89-50556 89-50562]

11/12/93 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 93-723 filed on 11/5/93. [89-50556, 89-50562] (ah) [89-50556 89-50562]

3/9/94 Received notice from Supreme Court, petition for certiorari GRANTED on 2/28/94 (crw) [89-50556 89-50562]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Grand Jury—October, 1987

No. CR-88-

UNITED STATES OF AMERICA, PLAINTIFF

v.

RUBIN GOTTESMAN, X-CITEMENT VIDEO, INC., AND R.G. SALES COMPANY, DEFENDANTS

INDICTMENT

[18 U.S.C. § 1962(c) and (d), Conducting a Racketeer Influenced and Corrupt Organization and Conspiracy; 18 U.S.C. § 1462, Interstate Transportation of Obscene Matters; 18 U.S.C. § 371, Conspiracy; 18 U.S.C. § 2252(a)(1) and (a)(2), Sexual Exploitation of Minors; 18 U.S.C. § 2, Aiding and Abetting; 18 U.S.C. § 922(g) and § 924, Possession of Firearm by Convicted Felon.]

THE GRAND JURY CHARGES:

At all times material to this indictment:

THE ENTERPRISE

1. Defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, and the following defendant entity, X-CITEMENT VIDEO, INC., and others known and unknown to the grand jury, constituted an enterprise as defined by Title 18, United States Code, Section 1961(4),

that is, a group of individuals and corporations associated in fact, which engaged in and whose leaders, members and associates operated and engaged in various unlawful activities in the Central District of California and elsewhere, including:

The knowing use of an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, in violation of Title 18, United States Code, Section 1462.

PURPOSES OF THE ENTERPRISE

2. The purposes of the enterprise included:

(a) the transportation in interstate commerce of obscene pictures, motion pictures, films or other matters of indecent character, that is, video cassette tapes, the object of which was to obtain money for the members of the enterprise, and

(b) the possession of a firearm by a convicted felon.

MEANS AND METHODS OF THE ENTERPRISE

3. Among the means and methods by which defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, and the following defendant entity, X-CITEMENT VIDEO, Inc., and others known and unknown to the grand jury, conducted and participated in the conduct of the affairs of the enterprise were the following:

(a) RUBIN GOTTESMAN was the principal owner and operator and one of the owners and operators of X-CITEMENT VIDEO, INC., located at 7116-7118 De Celis Place, Van Nuys, Los Angeles, California. It was his responsibility to (1) oversee the operation of the enterprise

and to participate in major decisions concerning the enterprise, including the ordering of obscene video cassette tapes, and other matters of indecent and immoral character; (2) give orders and directions to other members of the enterprise and its employees and associates; (3) facilitate the interstate transportation of obscene video cassette tapes, and other matters of indecent and immoral character; and (4) possess a firearm at his place of business to protect his business interests even though such possession was unlawful in that he was a convicted felon.

(b) STEVEN ORENSTEIN was an employee of X-CITEMENT VIDEO, INC. It was his responsibility to: (1) assist RUBIN GOTTESMAN in the operation of the enterprise; (2) give orders to other members of the enterprise and its employees and associates; and (3) facilitate the interstate transportation of obscene video cassette tapes, and other matters of indecent and immoral character.

(c) X-CITEMENT VIDEO, INC. was: (1) located at 7116-7118 De Celis Place, Van Nuys, City of Los Angeles, California; (2) a wholesale/retail outlet selling obscene video cassette tapes and other matters of indecent and immoral character; and (3) the name of a company used by members of the enterprise.

THE GRAND JURY CHARGES:

COUNT ONE

[18 U.S.C. § 1962(d)]

4. Introductory paragraphs 1 through 3 of this indictment (pages 1 through 3) are hereby incorporated as if fully set forth herein by reference in Count One.

5. In about June 1986, until the date of the filing of this indictment, in the Central District of California and elsewhere, defendants herein,

RUBIN GOTTESMAN and
STEVEN ORENSTEIN,

and the defendant entity,

X-CITEMENT VIDEO, INC.,

and others known and unknown to the grand jury, being persons employed by and associated with an enterprise engaged in, and the activities of which affected interstate commerce, did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree with each other, and with persons known and unknown to the grand jury, to commit an offense against the United States, that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of the above-described enterprise, through a pattern of racketeering activity, in violation of Title 18, United States Code, Section 1962(c).

6. It was a part of said conspiracy that the pattern of racketeering activity as referenced above and as defined by Title 18, United States Code, Sections 1961(1)(A), 1961(1)(B), and 1961(5), consisted of the following acts of racketeering activity involving the interstate transportation of obscene matters, as more fully set forth below:

(a) It was part of the conspiracy that from on about and between July 3, 1986, and July 8, 1986, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tape:

i. *Beyond DeSade/Never a Tender Moment*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Three of this indictment.

(b) It was part of the conspiracy that from on about and between July 17, 1986, and July 28, 1986, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tapes:

i. *Prisoner of Pleasure*
ii. *The Story of Prunella*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Four of this indictment.

(c) It was part of the conspiracy that from on about and between September 17, 1986, and September 19, 1986, defendants herein, RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tapes:

i. *Kneel Before Me*
ii. *Prisoner of Pleasure*
iii. *The Story of Prunella*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Five of this indictment.

(d) It was part of the conspiracy that from on about and between December 4, 1986, and December 16, 1986, defendants herein, RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tape:

i. *Beyond DeSade/Never a Tender Moment*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Six of this indictment.

(e) It was part of the conspiracy that from on about and between April 28, 1987, and April 30, 1987, defendants herein, RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tape:

i. *Kneel Before Me*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Seven of this indictment.

(f) It was part of the conspiracy that from on about and between May 12, 1987, and May 15, 1987, defendant

RUBIN GOTTESMAN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tapes:

i. *Beyond DeSade/Never a Tender Moment*
ii. *Kneel Before Me*
iii. *Prisoner of Pleasure*
iv. *The Story of Prunella*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Eight of this indictment.

OVERT ACTS

7. In furtherance of the above-described conspiracy and to achieve the objects thereof, the following overt acts were committed in the Central District of California and elsewhere:

a. From on about June, 1986, until the date of the filing of this indictment, defendant RUBIN GOTTESMAN acted as and conducted the business of X-CITEMENT VIDEO, INC. as principal owner and operator, and caused to be filed a Statement by Domestic Stock Corporation for X-CITEMENT VIDEO, INC. in the State of California, which document identified RUBIN GOTTESMAN as Chief Executive Officer, Chief Financial Officer, sole Director, and Designated Agent for Service of Process of X-CITEMENT VIDEO, INC., and which was executed by RUBIN GOTTESMAN on about December 30, 1985.

b. From on about June 1986, until the date of the filing of this indictment, defendant RUBIN GOTTESMAN

acted as and conducted the business of X-CITEMENT VIDEO, INC. as principal owner and operator, and caused to be filed a Notice of Issuance of Shares for X-CITEMENT VIDEO, INC. in the State of California, which document identified RUBIN GOTTESMAN as President of X-CITEMENT VIDEO, INC., and which was executed by RUBIN GOTTESMAN on about December 30, 1985.

c. On about June 3, 1986, in Chicago, Illinois, defendant STEVEN ORENSTEIN met with an undercover police officer of the Los Angeles Police Department and discussed the availability of Avon video cassette tapes.

d. On about June 11, 1986, in Los Angeles, California, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN met with an undercover police officer of the Los Angeles Police Department and an undercover special agent of the Federal Bureau of Investigation, at 7116 De Celis Place, Van Nuys, Los Angeles, California, and arranged to ship video cassette tapes to Honolulu, Hawaii.

e. On about and between July 3, 1986 and July 8, 1986, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., used a common carrier to ship from Los Angeles, California to Honolulu, Hawaii, the following video cassette tape:

i. *Beyond DeSade/Never a Tender Moment.*

f. On about and between July 17, 1986 and July 28, 1986, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., used a common carrier to ship from Los Angeles, California to Honolulu, Hawaii, the following video cassette tapes:

i. *Prisoner of Pleasure*
ii. *The Story of Prunella.*

g. On about September 17, 1986, in Los Angeles, California, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN met with an undercover police officer of the Los Angeles Police Department at 7116 De Celis Place, Van Nuys, Los Angeles, California, and discussed an order of video cassette tapes.

h. On about and between September 17, 1986 and September 19, 1986, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., used a common carrier to ship from Los Angeles, California to Honolulu, Hawaii, the following video cassette tapes:

i. *Kneel Before Me*
ii. *Prisoner of Pleasure*
iii. *The Story of Prunella.*

i. On about December 4, 1986, in Los Angeles, California, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN met with an undercover police officer at 7116-7118 De Celis Place, Van Nuys, Los Angeles, California, and discussed an order of video cassette tapes.

j. On about and between December 4, 1986 and December 16, 1986, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., used a common carrier to ship from Los Angeles, California to Honolulu, Hawaii, the following video cassette tape:

i. *Beyond DeSade/Never a Tender Moment.*

k. On about April 28, 1987 and April 30, 1987, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., caused to be shipped from Los Angeles, California to Honolulu, Hawaii, the following video cassette tape:

i. *Kneel Before Me.*

l. On about May 12, 1987 and May 15, 1987, defendant RUBIN GOTTESMAN, by and through the defendant entity, X-CITEMENT VIDEO, INC., used a common carrier to ship from Los Angeles, California to Honolulu, Hawaii, the following video cassette tapes:

i. *Beyond DeSade/Never a Tender Moment*
ii. *Kneel Before Me*
iii. *Prisoner of Pleasure*
iv. *The Story of Prunella.*

All in violation of Title 18, United States Code, Section 1962(d).

THE GRAND JURY CHARGES:

COUNT TWO

[18 U.S.C. § 1962(c) & 2]

4. Introductory paragraphs 1 through 3 of this indictment (pages 1 through 3) are hereby incorporated as if fully set forth herein by reference in Count Two.

5. From in about June 1986, and continuing thereafter up to and including May, 1987, within the Central District of California and elsewhere, defendants herein,

RUBIN GOTTESMAN and
STEVEN ORENSTEIN,

and the defendant entity,

X-CITEMENT VIDEO, INC.,

and others known and unknown to the grand jury, being persons employed by and associated with the above-described criminal enterprise, did unlawfully, willfully, and knowingly conduct and participate, directly and indirectly, in the conduct of the affairs of said enterprise, which engaged in and the activities of which affected in-

terstate and foreign commerce, through a pattern of racketeering activity, in violation of Title 18, United States Code, Section 1962(c).

6. The pattern of racketeering activity as defined by Title 18, United States Code, Sections 1961(1)(A), 1961(1)(B), and 1961(5), consisted of the following acts of racketeering activity involving the interstate transportation of obscene matters, as more fully set forth below:

(a) From on about and between July 3, 1986, and July 8, 1986, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tape:

i. *Beyond DeSade/Never a Tender Moment*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Three of this indictment.

(b) From on about and between July 17, 1986, and July 28, 1986, defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tapes:

i. *Prisoner of Pleasure*
ii. *The Story of Prunella*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Four of this indictment.

(c) From on about and between September 17, 1986, and September 19, 1986, defendants herein, RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tapes:

i. *Kneel Before Me*
ii. *Prisoner of Pleasure*
iii. *The Story of Prunella*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Five of this indictment.

(d) From on about and between December 4, 1986, and December 16, 1986, defendants herein, RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tape:

i. *Beyond DeSade/Never a Tender Moment*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Six of this indictment.

(e) From on about and between April 28, 1987, and April 30, 1987, defendants herein, RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tape:

i. *Kneel Before Me*

in violation of Title 18, United States Code, Section 1462, as set forth in Count Seven of this indictment.

(f) From on about and between May 12, 1987, and May 15, 1987, defendant RUBIN GOTTESMAN, by and through the defendant entity, X-CITEMENT VIDEO, INC., did unlawfully, knowingly and willfully use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tapes:

i. *Beyond DeSade/Never a Tender Moment*
ii. *Kneel Before Me*
iii. *Prisoner of Pleasure*
iv. *The Story of Prunella*

in violation of Title 18, United States Code, Section 1462,

as set forth in Count Eight of this indictment.

All in violation of Title 18, United States Code, Sections 1962(c) and 2.

FORFEITURE ALLEGATIONS

1. Introductory paragraphs 1 through 3 and Counts One and Two of this indictment (pages 1 through 16) are hereby incorporated by reference as if fully set forth herein for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 1963.

2. Through the aforesaid pattern of racketeering activity, the defendants, RUBIN GOTTESMAN, STEVEN ORENSTEIN, and X-CITEMENT VIDEO, INC., have acquired and maintained interests in violation of Title 18, United States Code, Section 1962, all of which interests, wherever located and in whatever names held, are therefore subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1).

3. The defendants, RUBIN GOTTESMAN, STEVEN ORENSTEIN, and X-CITEMENT VIDEO, INC., have interests in, security of, claims against, and property and contractual rights affording a source of influence over the above-described enterprise, which the defendants established, operated, controlled, conducted, and participated in the conduct of, in violation of Title 18, United States Code, Section 1962, all of which interests, security, claims, and property and contractual rights, wherever located and in whatever names held, are therefore subject to forfeiture to the United States, pursuant to Title 18, United States Code, Section 1963(a)(2).

4. The defendants, RUBIN GOTTESMAN, STEVEN ORENSTEIN, and X-CITEMENT VIDEO, INC., have property constituting and derived from proceeds which the defendants obtained, directly and indirectly, from racke-

teering activity in violation of Title 18, United States Code, Section 1962, all of which property, wherever located and in whatever names held, is therefore subject to forfeiture to the United States, pursuant to Title 18, United States Code, Section 1963(a)(3).

5. The property subject to forfeiture to the United States pursuant to paragraphs 2, 3, and 4, above, includes but is not limited to, the following interests of the defendants, RUBIN GOTTESMAN and X-CITEMENT VIDEO, INC.:

a. The real property, improvements, appurtenances and fixtures thereon, located at 22482 Calipatria Drive, Woodland Hills, Los Angeles County, California, and more particularly described as:

> Lot 121 of Tract No. 29150 as per map recorded in Book 739 Page 57 of Maps, in the office of the County Recorder of said County;

b. The following stock certificates, holdings, interests and proceeds thereof: All shares of stock of X-CITEMENT VIDEO, INC., owned by or on behalf of RUBIN GOTTESMAN;

c. The following bank accounts, and all funds credited to the accounts, as of the date of this indictment:

BANK	ACCOUNT NAME	ACCOUNT NUMBER
Santa Clarita National Bank	X-CITEMENT VIDEO, INC.	404 034 392
Santa Clarita National Bank	X-CITEMENT VIDEO, INC. Payroll Account	404 035 208
Santa Clarita National Bank	X-CITEMENT VIDEO, INC. Special Account	404 034 422
Santa Clarita National Bank	X-CITEMENT VIDEO	404 033 221
Santa Clarita National Bank	RUBIN GOTTESMAN	404 376 218
Santa Clarita National Bank	RUBIN GOTTESMAN or BARBARA GOTTESMAN	404 374 010
Wilshire CenterBank	X-CITEMENT VIDEO, INC.	01 104 098

d. Any and all personal property of X-CITEMENT VIDEO, INC. "Property" means and includes, but is not limited to, the contents of the below-listed location, and any and all locations from which X-CITEMENT VIDEO, INC. conducted its business. "Contents" includes, but is not limited to, various items as follows: video cassette tape recorders and/or players, television monitors, telephone systems and answering machines, video cassette tapes, including blank and recorded tapes, and other inventory, computer systems, including hardware and software, office equipment, including such items as calculators, cash registers, typewriters and copying machines, office fur-

nishings such as desks, chairs and filing cabinets, shelving and display materials, United States currency, and other contents;

X-CITEMENT VIDEO, INC.
7116-7118 De Celis Place
Van Nuys, Los Angeles, California.

THE GRAND JURY FURTHER CHARGES:

COUNT THREE

[18 U.S.C. §§ 1462 & 2]

On about and between July 3, 1986, and July 8, 1986, defendants herein,

RUBIN GOTTESMAN and
STEVEN ORENSTEIN,

and the following defendant entity,

X-CITEMENT VIDEO, INC.,

did unlawfully and knowingly use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tape:

a. *Beyond DeSade/Never a Tender Moment*

All in violation of Title 18, United States Code, Sections 1462 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT FOUR

[18 U.S.C. §§ 1462 & 2]

On about and between July 17, 1986, and July 28, 1986, defendants herein,

RUBIN GOTTESMAN and
STEVEN ORENSTEIN,

and the following defendant entity,

X-CITEMENT VIDEO, INC.,

did unlawfully and knowingly use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tapes:

a. *Prisoner of Pleasure*
b. *The Story of Prunella*

All in violation of Title 18, United States Code, Sections 1462 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT FIVE

[18 U.S.C. §§ 1462 & 2]

On about and between September 17, 1986, and September 19, 1986, defendants herein,

RUBIN GOTTESMAN and
STEVEN ORENSTEIN,

and the following defendant entity,

X-CITEMENT VIDEO, INC.,

did unlawfully and knowingly use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tapes:

a. *Kneel Before Me*
b. *Prisoner of Pleasure*
c. *The Story of Prunella*

All in violation of Title 18, United States Code, Sections 1462 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT SIX

[18 U.S.C. §§ 1462 & 2]

On about and between December 4, 1986, and December 16, 1986, defendants herein,

RUBIN GOTTESMAN and
STEVEN ORENSTEIN,

and the defendant entity,

X-CITEMENT VIDEO, INC.,

did unlawfully and knowingly use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tape:

a. *Beyond DeSade/Never a Tender Moment*

All in violation of Title 18, United States Code, Sections 1462 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT SEVEN

[18 U.S.C. §§ 1462 & 2]

On about and between April 28, 1987, and April 30, 1987, defendants herein,

RUBIN GOTTESMAN and
STEVEN ORENSTEIN,

and the defendant entities,

X-CITEMENT VIDEO, INC.,
and R.G. SALES COMPANY,

did unlawfully and knowingly use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tape:

a. *Kneel Before Me*

All in violation of Title 18, United States Code, Sections 1462 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT EIGHT

[18 U.S.C. §§ 1462 & 2]

On about and between May 12, 1987, and May 15, 1987, defendant,

RUBIN GOTTESMAN,

and the defendant entity,

X-CITEMENT VIDEO, INC.,

did unlawfully and knowingly use an express company and common carrier for carriage in interstate commerce to transport from the Central District of California to the District of Hawaii, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit:

The following video cassette tapes:

a. *Beyond DeSade/Never a Tender Moment*
b. *Kneel Before Me*
c. *Prisoner of Pleasure*
d. *The Story of Prunella*

All in violation of Title 18, United States Code, Sections 1462 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT NINE

[18 U.S.C. § 371]

1. At all times material to the indictment, defendant RUBIN GOTTESMAN was doing business as X-CITEMENT VIDEO, INC. and R.G. SALES COMPANY at

7116-7118 De Celis Place, Van Nuys, Los Angeles, California, and dealt in the interstate sale and distribution of sexually explicit materials.

2. At all times material to the indictment, defendant STEVEN ORENSTEIN was employed at X-CITEMENT VIDEO, INC.

3. From on or about February 5, 1987 and continuing thereafter up to and including the date of the filing of this indictment, in the Central District of California and elsewhere, defendants herein,

RUBIN GOTTESMAN and
STEVEN ORENSTEIN,

and the following defendant entities,

X-CITEMENT VIDEO, INC.,
and R.G. SALES COMPANY,

along with unindicted co-conspirator, HOWARD GOTTESMAN, and others known and unknown to the grand jury, did unlawfully, knowingly and willfully conspire, combine, confederate and agree together and with each other to commit offenses against the United States, to-wit:

(a) to knowingly distribute visual depictions that had been transported in interstate commerce, the producing of said visual depictions involving the use of a minor engaging in sexually explicit conduct, as that term is defined in Title 18, United States Code, Section 2256, and that such visual depictions were of such conduct, in violation of Title 18, United States Code, Section 2252(a)(2);

(b) to knowingly ship in interstate commerce visual depictions, the producing of said visual depictions involving the use of a minor engaging in sexually explicit conduct, as that term is defined in Title 18, United States Code, Section 2256, and that such visual depictions were of such conduct, in violation of Title 18, United States Code, Section 2252(a)(1).

4. It was part of the conspiracy that defendant RUBIN GOTTESMAN, doing business as X-CITEMENT VIDEO, INC., in Los Angeles, received from a source in Texas, numerous video cassette tapes featuring Tracy Lords, which contained visual depictions of a minor engaging in sexually explicit conduct.

5. It was part of the conspiracy that defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN maintained the video cassette tapes featuring Tracy Lords in the inventory of X-CITEMENT VIDEO, INC., along with other sexually explicit materials for sale and distribution.

6. It was a further part of the conspiracy that defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entities, X-CITEMENT VIDEO, INC. and R.G. SALES COMPANY, would distribute and sell the video cassette tapes featuring Tracy Lords for money.

7. It was a further part of the conspiracy that defendants RUBIN GOTTESMAN and STEVEN ORENSTEIN, by and through the defendant entities, X-CITEMENT VIDEO, INC. and R.G. SALES COMPANY, along with unindicted co-conspirator HOWARD GOTTESMAN, would send an interstate shipment from Los Angeles, California to Honolulu, Hawaii, of video cassette tapes featuring a minor, Tracy Lords, engaging in sexually explicit conduct, and that they would receive payment for the shipment.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed:

1. On about February 5, 1987, defendant RUBIN GOTTESMAN met with an undercover police officer of the Los Angeles Police Department at 7116-7118 De Celis Place, Van Nuys, Los Angeles, California, for the purpose of negotiating the sale of sexually explicit materials and advised said undercover police officer that he had approximately forty-nine (49) video cassette tapes featuring Tracy Lords, which he had received from a store in Texas.

2. On about February 5, 1987, at 7116-7118 De Celis Place, Van Nuys, Los Angeles, California, defendant STEVEN ORENSTEIN advised an undercover police officer of the Los Angeles Police Department of two video cassette tapes in the inventory at X-CITEMENT VIDEO, INC. that featured Tracy Lords when she was a minor, titled *Tracie Lords* and *Lust In The Fast Lane.*

3. On about February 5, 1987, defendant RUBIN GOTTESMAN quoted to an undercover police officer of the Los Angeles Police Department a price of $1,000 for Tracy Lords video cassette tapes, including *Tracie Lords* and *Lust in the Fast Lane.*

4. On about February 6, 1987, at 7116-7118 De Celis Place, Van Nuys, Los Angeles, California, defendant STEVEN ORENSTEIN and another employee at X-CITEMENT VIDEO, INC., brought two wrapped packages containing video cassette tapes featuring Tracy Lords, including *Tracie Lords* and *Lust In The Fast Lane,* to RUBIN GOTTESMAN for sale to an undercover police officer of the Los Angeles Police Department.

5. On about February 6, 1987, at 7116-7118 De Celis Place, Van Nuys, Los Angeles, California, defendant RUBIN GOTTESMAN gave video cassette tapes featuring Tracy Lords, including *Tracie Lords* and *Lust in the Fast Lane,* to an undercover police officer of the Los Angeles Police Department and received in return $1,000 cash as payment.

6. On about February 13, 1987, at 7116-7118 De Celis Place, Van Nuys, Los Angeles, California, defendant RUBIN GOTTESMAN met with and advised an undercover police officer of the Los Angeles Police Department that he had approximately fifty-six (56) Tracy Lords video cassette tapes available for sale.

7. On About April 28, 1987, an undercover police officer of the Los Angeles Police Department met with defendant RUBIN GOTTESMAN and unindicted co-conspirator HOWARD GOTTESMAN on the premises of X-CITEMENT VIDEO, INC. at 7116-7118 De Celis Place, Van Nuys, Los Angeles California, for the purpose of discussing additional sales of Tracy Lords video cassette tapes to the undercover police officer and a disguised method of shipping the Tracy Lords tapes to Hawaii without being detected.

8. On about April 28, 1987, unindicted co-conspirator HOWARD GOTTESMAN, at the direction of defendant RUBIN GOTTESMAN, pointed out to an undercover police officer of the Los Angeles Police Department specific tapes at X-CITEMENT VIDEO, INC., which featured Tracy Lords when she was a minor.

9. On about April 28, 1987, an undercover police officer of the Los Angeles Police Department gave RUBIN GOTTESMAN at 7116-7118 De Celis Place, Van Nuys, Los Angeles, California, a check in the amount of two hundred ($200.00) dollars as payment for sexually explicit video cassette tapes including tapes featuring Tracy Lords.

10. On about April 30, 1987, a cardboard box containing the following video cassette tapes:

a. *Sex Shoot*
b. *Aroused*
c. *Sweet Little Things*
d. *Harlequin Affair*

e. *Screaming Desire*
f. *Joys of Erotica Series 114*
g. *Pleasure Productions Volume 10*

was received at Blue Moon Distributors, 1750 Kalakaua Avenue, #3162, Honolulu, Hawaii 96826, bearing a return address of R.G. SALES CO., 7116 De Celis Place, Van Nuys, California 91406.

All in violation of Title 18, United States Code, Section 371.

THE GRAND JURY FURTHER CHARGES:

COUNT TEN

[18 U.S.C. §§ 2252(a)(2) & 2]

On or about February 6, 1987, at Los Angeles, in the Central District of California, defendants herein,

RUBIN GOTTESMAN and
STEVEN ORENSTEIN,

and the following defendant entity,

X-CITEMENT VIDEO, INC.,

did unlawfully and knowingly distribute visual depictions that had been transported in interstate commerce, the producing of said visual depictions involving the use of a minor engaging in sexually explicit conduct, as that term is defined in Title 18, United States Code, Section 2256, and that such visual depictions were of such conduct, to-wit:

The following video cassette tapes:

a. *Tracie Lords*
b. *Lust in the Fast Lane*

All in violation of Title 18, United States Code, Sections 2252(a)(2) and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT ELEVEN

[18 U.S.C. §§ 2252(a)(1) & 2]

On or about April 30, 1987, at Los Angeles, California, in the Central District of California, defendant,

RUBIN GOTTESMAN

and the following defendant entities,

X-CITEMENT VIDEO, INC.,
and R.G. SALES COMPANY,

did unlawfully and knowingly ship in interstate commerce from Los Angeles, California to Honolulu, Hawaii, visual depictions, the producing of said visual depictions involving the use of a minor engaging in sexually explicit conduct, as that term is defined in Title 18, United States Code, Section 2256, and that such visual depictions were of such conduct, to-wit:

The following video cassette tapes:

a. *Sex Shoot*
b. *Aroused*
c. *Sweet Little Things*
d. *Harlequin Affair*
e. *Screaming Desire*
f. *Joys of Erotica Series 114*
g. *Pleasure Productions Volume 10*

All in violation of Title 18, United States Code, Sections 2252(a)(1) and 2.

FORFEITURE ALLEGATIONS

1. Counts Nine, Ten and Eleven (pages 27 through 33) of this indictment are hereby incorporated by reference as

is fully set forth herein for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 2253.

2. Through the aforesaid violations of Title 18, United States Code, Section 2252, the defendants, RUBIN GOTTESMAN, STEVEN ORENSTEIN, X-CITEMENT VIDEO, INC., and R.G. SALES COMPANY, have used and intended to use property in violation of Title 18, United States Code, Section 2252, and have possessed property constituting and derived from gross profits and other proceeds obtained from violations of Section 2252, making all such property used, intended to be used, property constituting and derived from gross profits and other proceeds obtained from violations of Section 2252 forfeitable to the United States, pursuant to Title 18, United States Code, Sections 2253(a)(1) and 2253(a)(2). Such property includes, but is not limited to, the interests held by RUBIN GOTTESMAN, X-CITEMENT VIDEO, INC., and R.G. SALES COMPANY, in the following assets and the proceeds thereof:

a. The real property, improvements, appurtenances and fixtures thereon, located at 22482 Calipatria Drive, Woodland Hills, Los Angeles County, California, and more particularly described as:

Lot 121 of Tract No. 29150 as per map recorded in Book 739 Page 57 of Maps, in the office of the County Recorder of said County;

b. The following stock certificates, holdings, interests and proceeds thereof:

i. All shares of stock of X-CITEMENT VIDEO, INC., owned by or on behalf of RUBIN GOTTESMAN;

ii. All shares of stock of R.G. SALES COMPANY, owned by or on behalf of RUBIN GOTTESMAN;

c. The following bank accounts and all funds credited to the accounts as of the date of this indictment:

BANK	ACCOUNT NAME	ACCOUNT NUMBER
Santa Clarita National Bank	X-CITEMENT VIDEO, INC.	404 034 392
Santa Clarita National Bank	X-CITEMENT VIDEO, INC. Payroll Account	404 035 208
Santa Clarita National Bank	X-CITEMENT VIDEO, INC. Special Account	404 034 422
Santa Clarita National Bank	X-CITEMENT VIDEO	404 033 221
Santa Clarita National Bank	R.G. SALES	404 033 248
Santa Clarita National Bank	RUBIN GOTTESMAN	404 376 218
Santa Clarita National Bank	RUBIN GOTTESMAN or BARBARA GOTTESMAN	404 374 010
Wilshire Center Bank	X-CITEMENT VIDEO, INC.	01 104 098

d. Any and all personal property of X-CITEMENT VIDEO, INC. "Property" means and includes, but is not limited to, the contents of the below-listed location, and any and all locations from which X-CITEMENT VIDEO, INC. conducted its business. "Contents" includes, but is not limited to, various items as follows: video cassette tape recorders and/or players, television monitors, telephone

systems and answering machines, video cassette tapes, including blank and recorded tapes, and other inventory, computer systems, including hardware and software, office equipment, including such items as calculators, cash registers, typewriters and copying machines, office furnishings such as desks, chairs and filing cabinets, shelving and display materials, United States currency, and other contents;

X-CITEMENT VIDEO, INC.
7116-7118 De Celis Place
Van Nuys, Los Angeles, California.

e. Any and all personal property of R.G. SALES COMPANY. "Property" means and includes, but is not limited to, the contents of the below-listed location, and any and all locations from which R.G. SALES COMPANY conducted its business. "Contents" includes, but is not limited to, various items as follows: video cassette tape recorders and/or players, television monitors, telephone systems and answering machines, video cassette tapes, including blank and recorded tapes, and other inventory, computer systems, including hardware and software, office equipment, including such items as calculators, cash registers, typewriters and copying machines, office furnishings such as desks, chairs and filing cabinets, shelving and display materials, United States currency, and other contents;

R.G. SALES COMPANY
7116-7118 De Celis Place
Van Nuys, Los Angeles, California.

THE GRAND JURY FURTHER CHARGES:

COUNT TWELVE

[18 U.S.C. §§ 922(g) & 924]

On about May 27, 1987, in the Central District of California, defendant,

RUBIN GOTTESMAN,

having been convicted on about November 14, 1980, in Case No. 80-59-CR-RYSKAMP (EATON), in the Southern District of Florida, of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed in and affecting commerce, a firearm, to-wit: One (1) 9mm Mab Brevete semi-automatic pistol, Model P-15, bearing serial number 610743.

The grand jury further alleges that the property in question: one (1) 9mm Mab Brevete semi-automatic pistol, Model P-15, bearing serial number 610743, is subject to forfeiture.

All in violation of Title 18, United States Code, Sections 922(g) and 924.

A TRUE BILL:

_____

FOREPERSON

_____

UNITED STATES ATTORNEY
ROBERT C. BONNER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-295-Kn
Volume 10

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RUBIN GOTTESMAN, INDIVIDUALLY AND DOING BUSINESS AS X-CITEMENT VIDEO AND STEVEN ORENSTEIN, DEFENDANTS

Honorable DAVID V. KENYON, Judge Presiding

[38] • • • • •

THE COURT: What counts are those? I don't have my complaint in front of me.

MR. FLEISHMAN: One to eight is the obscenities, nine is the conspiracy count, 10 and 11 are the child [39] pornography, and then there is some forfeiture.

THE COURT: So you are arguing 10 and 11; is that right?

MR. FLEISHMAN: Yes, your Honor.

THE COURT: Okay.

MR. FLEISHMAN: Count nine is a conspiracy to violate the child pornography. That falls down and of course the conspiracy would fall with it.

THE COURT: All right.

MR. FLEISHMAN: I started in my memorandum on page 16 of count 10 of the indictment which reads—which

alleges, "That the defendants did unlawfully and knowingly distribute visual depictions that had been transported in interstate commerce, the producing of said visual depictions involving the use of a minor engaging in sexually explicit material and that such visual depictions were of such conduct."

This indictment, your Honor, tracks the statutory language. It's conceded—let me—let me take back "conceded." The cases make it clear that Congress intended to eliminate all scienter from the statute; that Congress intended that the defendant could be found guilty even if the person did not know or did not have any reason to believe that the actor was underage. That much is clear.

[40] Certainly, at the time that the indictment was handed down by the grand jury, the government consistently had taken that position. I call the Court's attention to the case of *United States versus Kleiner,* 663 F.2d 43 and there the Court said—

THE COURT: Forty-two? Did you say 42?

MR. FLEISHMAN: Page 43. 663 F.2d.

THE COURT: Okay.

MR. FLEISHMAN: The Court agreed with the government that the knowledge requirement under Section 2252—that's the section that we're being charged under—is not whether the tape had been made—using minors, but rather it is only the shipment of the sexually explicit material which must be knowing.

In the *United States versus Tolczeki*, T-O-L-C-Z-E-K-I, 614 F.2d 1424 at 142(a), the government stated the—stated merely—that the government really needs to show that defendant knowingly shipped in interstate commerce the prohibited material, and that the government need not know that the material contains sexual conduct of minors.

It went on to say that Congress specifically omitted mens rea. So we have a statute, your Honor, which on its face and giving effect to the Congressional intent, eliminated—

[41] THE COURT: Wait. That's the same ruling.

MR. FLEISHMAN: They both held that the government's contention was that they need not and the Court agreed in both of those instances.

Now, in this case, your Honor, the government, in its response to our motion for a judgement of acquittal has attached the opposition that it previously attached when a similar motion was made pretrial to dismiss these counts, and the government argues there that it no longer—it no longer believes that the scienter is out of these cases, that it now thinks that scienter is required. And indeed your Honor ruled, as I recall it, that the government has the burden of proving that the defendant knew that Tracy Lords was under the age of 18 at the time th[illegible]e made the films.

Now, with all due respect, your Honor, if the statute eliminates scienter and if the indictment is returned without the scienter element in it, that cannot be cured—that cannot be cured by any evidence that may be brought forward on—in the trial.

Now, the clearest answer in terms of that—that the statute is, in fact, unconstitutional on its face in that it eliminates all scienter was first really made clear in the opinion that Judge Kozinski wrote in United States against—United States District Court—

[42] THE COURT: What did you say? I just missed it.

MR. FLEISHMAN: That was made clear in the case that Judge Kozinski wrote.

THE COURT: Clear—that what?

MR. FLEISHMAN: That the statute is unconstitutional as it applies to a person who merely distributes the material as opposed to a person who produces the material.

And that stems from footnote circumstances, your Honor, which was found on page 543, preceding this footnote, and I guess I better get to that first.

THE COURT: Just so I have it in my notes here, the full cite of that case.

MR. FLEISHMAN: It's 858 F.2d, 534 and the footnote is on page—footnote six is on page 543.

On page 538, Judge Kozinski first makes it clear that knowledge of age is not required under the child pornography act, and then he cites *Smith* for the proposition that without some scienter requirement the statute would be unconstitutional as far as if it has the potential for any substantial chilling of free speech.

On page 539, he says, "a speaker may not be put at complete peril in distinguishing between protected and unprotected speech, and that strict liability is not consistent with the First Amendment where First Amendment rights come into play."

[43] He also pointed out that the penalty is a very heavy one, running as high as 10 years and a $100,000 fine. And he says that the First Amendment does not permit imposition of criminal penalties on the basis of strict liability where doing so would seriously chill speech.

And then we come to footnote six where he says:

"While it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry, but also the ages of actors with whom they have no direct contact."

And in footnote six, Judge Kozinski drew a distinction between a person such as the defendant here who merely distributes the material and the defendants were involved in that case, which was the *Hamling* case, the defendants there were the producers of the film.

And, if I may, I would like to read footnote six because part of this argument is found there.

Footnote six reads: Defendants would have us go farther and hold that the First Amendment requires the government to prove scienter as part of its case. They rely on the Supreme Court cases holding that the government must carry such a burden in cases involving book sellers and other downstream distributors.

And then it says, see, for example, *Hamling* which [44] was cited:

"We do not view these cases as controlling here. Those who arrange for minors to appear in sexually explicit materials are in a far different position from those who merely handle the visual images after they are fixed on paper, celluloid or magnetic tape.

"While it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of actors with whom they have had no direct contact," see *Smith*, "producers are in a position to know or learn the ages of their employees."

So that the rule that was established in the *Kantor* case first by Judge Letts and then affirmed by the 9th Circuit which is that so far as a producer is concerned, the government does not have the burden of proving that the defendant knew the age, but that the defendant has the opportunity to put forward as an affirmative defense that he or she did not know the age.

The difference there—and this is what Judge Kozinski spelled out at great length—that you could not—the Court could not, consistent with our constitutional framework, could not what is to say in the *Cantor* case, Judge Letts said that even though Congress did not provide for an affirmative defense of the kind that I [45] just spoke about that it was appropriate to put that affirmative defense in there; otherwise, the statute doesn't go that far.

Judge Kozinski says, Well, we can go that far because Congress didn't speak one way or the other as to whether or not we could have an affirmative defense but we couldn't contradict Congress and since Congress explicitly said that the government did not have to prove that the defendant knew the person was underage, that—as I say, you could go that far, but since it is true that a Court could not put into—could not construe a statute when construing it is in direct conflict with the congressional intent, what follows is that there's no—what your Honor did was an attempt to save the statute by saying, "Well, I'm going to throw the burden on the government to prove that the defendant knew that she was underage." But that really is to amend the statute in a way that is not permissible, and Judge Kozinski says it is not permissible in this case that we are talking about.

And, again, as I pointed out in our memorandum where we have the cases which say that the—if the indictment has failed, then it cannot be cured by anything that occurs on the trial and the indictment which merely follows the statutory language does not allege that the defendant knew that Tracy Lords was underage at the time that the shipment [46] was made. So—

THE COURT: Well—and you think the indictment would be valid if it said that?

MR. FLEISHMAN: No. Because the statute is still unconstitutional so that—it would—if I'm—it is—one thing is correct and undisputed as I read the case, that Congress read out all scienter. If they did that, then you have to look at the act on its face and say, Can Congress do that consistent with the First Amendment, and Judge Kozinski relying on *Smith* says the answer to that is no. If the statute's unconstitutional, then the indictment could not cure it.

All I'm saying is that there is a double here. First we get it out because the statute is bad, if for just to keep the thing going logically it becomes bad again when the indictment charges in statutory language in a way that is unconstitutional.

So the answer to your Honor's question is, no, the indictment could not cure the statute any more than a Court could. Rewrite the statute when Congress is clear on what its intent is and Congress had been extremely clear on what its intent was here, not to have the burden on the government to prove that the defendant knew that the person was underage. So that takes care of the statute on its face, and that is construed in this case.

[47] There is the additional argument that is—there are a number of them. The one that I briefed slightly, we will stay with that for a moment, is the justification for the statute vis-a-vis the federal interest and the state interest in protecting minors from abusive conduct.

In *Ferber*, the Court stated that the states—that New York has a compelling interest in protecting minors and in order to further that compelling interest, the state was justified infringing upon what would be First Amendment rights.

But in terms of our—our federal—state system, your Honor, this is something that is a matter of primary concern to the states and not the federal government. The federal government does not have the general powers that the states have to pass legislation for the good and welfare of the community. It is, of course, a—Congress has vast but nevertheless limited powers. There is no question that the government has power under the commerce clause to say that the —anyone who distributes child pornography in interstate commerce that Congress has the power—I'm not saying "power," but I'm saying that the federal interest

is attenuated. The federal interest in preventing people from taking pictures of minors that the federal interest is less than the state's interest and therefore, the—it's not as compelling. Indeed, we say [48] it is not compelling at all. It's compelling—it is a compelling interest looked at from the state side of view. It is an attenuated interest from the federal point of view. And when we balance in terms of what's the justification for suppressing speech—and that's what we are doing because it is conceded that the films involved are not obscene and are protected by the First Amendment. So you have to have a compelling justification for that. And in *Ferber*, the Court said the state had a compelling interest for doing it. And I'm saying that the federal interest is less than—how much less than I'm not going to try and get at—but it is something less than the state's interest. But that brings us to what seems to me to be the dispositive—a second dispositive resolution.

THE COURT: Can you wrap it up in five minutes and keep your word to the world?

MR. FLEISHMAN: Yes. I always keep my word. I'll do it in five minutes.

And that is that *Ferber*, the age was under 16, and in the opinion that Judge Kozinski wrote—I think it is footnote four, if my memory is right—yes. The legislative history reveals very clearly, your Honor, that Congress moved the age from 16 to 18 not because they wanted to reach conduct engaged in by those persons who were 16 and 17 years old, but to be able to effectively [49] reach those who were—who were 13, 14 and 15. And I'd like to read footnote four from the opinion. And, again, this is the case of *U.S. against United States District Court for the Central District of California* which I gave you the citation for which is also the *Kantor* case when it was before Judge Letts.

Here how footnote four reads—

MR. PITT: Excuse me. Is the *New York versus Ferber* case, Supreme Court case or underlying case?

MR. FLEISHMAN: Supreme Court *Ferber* case.

MR. BURGASSER: Now you are going to talk about the *Kantor* case?

MR. FLEISHMAN: At page 543, footnote four. It reads:

Congress was acutely aware of difficulty of prosecuting cases where the minor fell in the gray area around the age of majority. The house report on the 1984 amendments indicates that Congress raised the statutory age of majority from 16 to 18 in order to shift the gray zone upward. And they—and this is quoting now from the legislative history—"the prosecution for distribution is"—and then they have "sic." They made a mistake—"are most often based solely on the pornography which is the subject of the offense. The children cannot be located. Based on the pictures alone, the prosecution must [50] show that the child is under the age of 16. This is extremely difficult once the child shows any sign of puberty."

"Raising the age to 16"—sic—that is to say the report was in error but properly read it means—"raising the age to 18"—is making the correction—"would facilitate the prosecution of child pornography cases and raise the effective age of protection of children from these practices, probably not to 18 years of age, but perhaps to 16."

And then they go on this the same footnote and I'm skipping the citation which was in the footnote, they quote then the statement of Mark Richard, Deputy Assistant Attorney General, saying if the law were amended to protect minors under the age of 18 rather than 16, it would be easier to prosecute cases in which 14- or 15-year-olds have been sexually exploited by regarding—by regarding whom—but—but

regarding whom after proof of age is not available.

So translated, it is very clear that, A, the United States Supreme Court approved a New York statute which said that the person had to be under 16 years of age, that Congress moved that 16 up to 18 so that they could more effectively get at the exploitation of people under 15 years of age and that they were saying that usually the [51] only way you can tell by looking at the picture of the tape or there is a gray area and you can't tell, in our case, the government's case establishes that on their terms—on their terms Tracy Lords was always over 16 years of age so that this situation, in this case, your Honor, is one in which however you—

THE COURT: Do you think that they—people who were capable of writing this law didn't have in mind that on occasions they will be able to prove the age by some other means other than visual and therefore there should be—if you could do that, then if you prove that they're over 16, then it is not a violation of the law?

MR. FLEISHMAN: I think that is in the legislative history. I think if you look at the history more fully, they stated what the purpose of it was—

THE COURT: Well, it is clear—I mean, it may well be that they they figured that it was more serious for—the more younger you get, but I mean that may well be, but you have to consider them to be—quite frankly, rather stupid if they wrote a law that said, Well, If you really find one of these 16- to 18-year-olds that you can prove, then—forget that one. We don't really mean it. That's just really—particularly in light of the fact that—it may be—I mean, isn't it also—I'm just asking.

MR. FLEISHMAN: Sure.

[52] THE COURT: Isn't it also arguable, this Court just had probably not—it might be fair to say not a little experience with dealing with young people in trouble. And

and time and time again some of the difficult people—I mean age, young ladies particularly where they are enamored of some—oftentimes if they get enamored in the worst dying town, and they will do anything. It is their first love and they are 16—16, and they defy their parents, they defy everything they were ever brought up, for a couple of years they're out of control and then they come back into reality and settle down and some of them are pretty messed up by that time. And it's just—it's hard for the Court to believe that these people, while they were trying to get the 14-year-olds and the 13-year-olds, because that is just outrageous anymore, they were reluctant, apparently, to say, if you do it with a 16-year-old, you are in trouble.

MR. FLEISHMAN: No. I respectfully disagree. Again, we have to keep in mind that the basis of all of this when the law was first passed in 1977, the Department of Justice told Congress that they could not—that Congress could not make it a crime to distribute a portrayal of a person underage unless the material was obscene. That was because the Department of Justice then thought that there was not a sufficient compelling reason [53] to justify intrusion on First Amendment rights. That's the way the law read prior to the amendment in 1984 and the legislative history accompanying the 1984 act reflects that that is what it was. But then they said, "We looked at *Ferber* and we decided that we could follow *Ferber*." But *Ferber* was 16—16 or under. That was their model.

If I'm right, and I believe I am in saying that the state interest is more prominent interest than the federal interest in terms of that conduct, after all, we have a juvenile court, the federal government doesn't have fed juvenile court. This business of protecting children is primarily a state, not primarily a federal interest, although the federal government has an interest. I'm just saying it is an

attenuated interest. And I'm saying that there is a lesser interest, a far lesser interest in protecting a 16-, 17-year-old people, and it is fully legislative history. It goes two ways: one that Congress may be clear where—in those situations, where it is clear that the person is 16 years of age or over, that the law does not apply to that person. I believe that is absolutely clear from the legislative history and put it the other way. If you were to say it otherwise, then the—there's not a compelling interest in it. There's no sufficient—there's a great interest—a great interest that justifies draponia action if you fool around with 10-, [54] 11-, 12-, 13-, 14-year-old people. When you have a 16-year-old girl who is precocious, then the need to protect is much less and we just—justification for intruding upon First Amendment rights is lesser and would not be sufficient in this case.

Thank you. I think I came in just on time.

THE COURT: Okay.

MR. SCHWARTZ: May we take three or four minutes?

THE COURT: The problem that I have—you certainly may. Let me ask you one more thing to just kind of finish my thoughts.

When you are really saying it is all right, apparently, for the government to prove that a girl who is in fact, 15 years old, that she's at least under 18, she may be 16, she may be 17 so if, in this case, there was no other evidence except viewing the pictures and we have—let's assume we have experts come in and say that child's body that is a —well, it could be 16, it could be 15, it could be in that area, and then you say that's okay. It turns out it is 15—at least—the experts say at least she's 16, and that's all right because she's really 15. And we will never know that. That is a tough argument for you to espouse so vigorously it seems to me. Do you understand—

MR. FLEISHMAN: I understand you completely, your [55] Honor. It is, again one of these areas where there is—of course, I understand your Honor. Your Honor is putting your finger right on the problem. But the facts—

THE COURT: What you are saying is the government doesn't dare, if they want to prosecute somebody who is 16, they don't dare put on any positive evidence as to her exact age because if they do, they run into the Fleishman argument on—

MR. FLEISHMAN: It is not my argument, Judge. It is the Attorney General's argument, and it's the congressional one.

THE COURT: Whoever's argument it is—

MR. FLEISHMAN: I have some fanciful thoughts, but this is not one of them. I'm dancing to the tune of legislative history.

THE COURT: I understand: Thank you. That's.

* * * * *

[93] THE COURT: I don't ever mind re-visiting something again, if you got something to enlighten me.

MS. KOCKRITZ: Mr. Fleishman has made the statement that your Honor did deny the motion, but your Honor has admitted—amending—excuse me—the statute in the process and that simply is not the case as we stated. The statute requires knowledge element. There is the word "knowledge" in there. We put the word "knowledge" in our indictment. That's what we meant. Knowledge that this Tracy Lords film had child pornography in it.

We also believed that the legislative history requires and shows that the government in a distribution statute, Section 2252, prosecution, we have to show that the defendant had knowledge that there was child pornography in whatever he was distributing.

Mr. Fleishman cited the *Kantor* case, and I know that well. That case was—was addressing a different statute. That case addressed the question whether under the production of child pornography statutes which is section 2251, whether the government had to prove whether the producer had knowledge the child in the material was underage. That was a different case.

In that case, the Legislative History clearly showed that the government was not required in the production case to prove that the defendant had knowledge that the child [94] was a minority status. The defendant recognized that, the government recognized that, and the issue was whether that violated the First Amendment given that fact that it was written as a strict liability statute. Judge Kozinski agreed with Judge Letts that the government need not prove that, but he created a good-faith defense in a production statute so that the defendant can come in and give proof of his good-faith belief that the child was underage.

THE COURT: Was not.

MS. KOCKRITZ: Was not. That's not what we have here. We are admitting and accepting the burden that we do affirmatively have to prove that the defendant had knowledge that the minor was underage, and that's the way we charged it, and that's the way we have proved it. And the reasons why we accepted that burden have been for the past few years our experience in the way the cases—the distribution area had gone, as we noted in our motion, there are conflicting cases on this. But the most recent case that came out was the *Sharon* case in the Southern District of New York which went into a rather lengthy discussion with the Legislative History and which prompted everyone to do a rather lengthy discussion on the Legislative History. And that's whether we didn't come to the conclusion as we stated here, said in our motions,

and I believe we quote part of the Legislative History on the [95] response.

As to a distribution statute, it is clear in the Legislative History also that Congress meant that the government had to prove the defendant had knowledge that the minor was underage. And as I've said we accept that burden, and your Honor is not amending the statute at all to agree with us. We—as we've said, it is in the statute, it is in the Legislative History. We charged it, and we so proved it.

Again, I think I already talked about this federal interest, whether the federal government has a compelling interest in protecting minors such that the child pornography statute is valid. I think Mr. Fleishman's arguments and his quotations from the Legislative History help us as well. As he stated, there is every indication in the Legislative History that Congress amended the statute to raise the age to 18 to cover this gray area. And by that they meant the age whereby a minor who comes into puberty and shows signs of maturity. And it is very clear that Congress was just as interested in protecting those minors as well as the minors who have not shown the signs of puberty yet.

I think this is buttressed by, again, the *Ferber* decision where it says very clearly that there is a compelling governmental interest in protecting children [96] from the psychological, physical, mental damage that is done to them by engaging in child pornography. And this really is irrelevant when the child is precocious. There is no indication that Congress was checking out a child's history to determine whether or not she is harmed. There's not statistical survey to be done on how precocious she is in the past. The fact of the matter is Congress is interested in protecting children under the age of 18 and the Supreme Court has affirmed that this is a compelling interest because of the damage that is done to the child.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-295-Kn
Volume 11

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RUBIN GOTTESMAN, INDIVIDUALLY AND DOING BUSINESS AS R.G. SALES COMPANY, STEVEN ORENSTEIN, AND X-CITEMENT VIDEO, INC., DEFENDANT

Honorable DAVID V. KENYON, Judge Presiding

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[4] **LOS ANGELES, CALIFORNIA, on Wednesday, May 3, 1989, beginning at approximately 8:00 a.m.**

THE COURT: All right. All right. Good morning. We will make a ruling.

As to the motion to dismiss—we really have two rulings, one having to do with the four films, and the other having to do with the minor, Traci Lords.

From the outset, the Court was impressed by the fact that the government felt that—apparently felt—that the common variety district court judge could determine what the community standards are in this central district area, not only because of the geographical enormity of the area, but of its amorphous and, at the same time, diverse character.

As far as the Court is concerned—it is the judge's opinion that we're dealing with certainly—that portions of each of the films, small in some places, were offensive personally to the Court.

The Court's personal view is that they're raunchy in entirety, vulgar, and all of the films were basically sleazy, but I know that the personal reactions of the Court are not the gauge by which we are to go. These are not snuff films and they're not slashing films; they don't involve children nor is there bestiality.

The great billing that the Court had that somehow [5] people will get sick by looking at these things—I suppose people can—I know the Court's reaction was that it had seen many things in this world that caused it to get closer to losing its morning breakfast, or what have you, than these films did. That business about vomiting and all, I frankly did not look forward to with anticipation and perhaps may have even been motivated in asking to see them all at once to get it over with—never really took place.

These films, perhaps are in-between or on-the-edge type of thing. They are certainly not as the films I've described, and those films, it would seem to me, in deciding what the community standard is in them, would be much easier, much easier, had there been a different standard to apply. Had the test been, for instance, by a preponderance of the evidence, I would suspect that the decision would be much easier to at least—or the ability to ascertain the community standard would have been much easier to apply.

But the government has what is so often referred to as "heavy burden," and it is a heavy burden of proving something beyond a reasonable doubt, that these films violate, in the appropriate ways, the community standards.

The public in this day and age apparently accepts some things that, when I was young, would never have been [6]

accepted. I remember the incredible problems that were raised over the film "The Outlaw." And here and then that film was, when I got to it and I finally saw it I guess years later or at some point than when it first all arose, I walked away and said, "What's the big deal?" The people were just really totally, totally wrapped up in the idea of a woman's bosom being seen in those days. And there was an apparent—well, there was a rape scene, I remember, in the hay or something in the barn or something that really—you couldn't see much.

Now, in this day and age, you see violence depicted on the screen that just gets to the point of just being horrifying. Kids go to movies and they pack in the movie houses of horror films that are just literally horribly shocking. It is what they go for, they go for it, I think. And except for the fact that these matters here are sexually explicit, there is stuff out there which is apparently accepted by the community which is far more morbid and shocking.

What the Court is called upon to say was that the community—and I'm trying to say this properly—the community will accept that kind of shocking thing, but that very same community you just have to know would not accept this kind of thing. And, quite frankly, without some kind of evidence to that effect, it is impossible for [7] the Court to say that, beyond a reasonable doubt, that violates the community standard.

We hear voices. We know that policemen don't like it, not all policemen. As a matter of fact, we don't know how many policemen like it. As a matter of fact, it is such a difficult subject to know what people think and what they really accept because they're not going to tell you. I don't know without some kind of survey or what have you what my next-door neighbor thinks about this. I know this: it's only logical that people who would not be shocked at this

or who would pass it off as nothing would not necessarily stand on the street corner and tell you that, but those who really are offended by it might well do that and do that.

I know that the social community in which I live—I mean the social community in which I live—some would think it's not very much. I am sure to an absolute person that, certain groups that I belong to, there probably wouldn't be a soul in the place who wouldn't be offended by it. They're a rather cool group in terms of not getting upset, but they would be offended by it. I don't think that they represent—at least I have no evidence—that that attitude represents the entire community's average person or what have you in the community of what that attitude is. [8] I'm simply saying that the Court finds itself in a position where it never found itself before, to have to kind of define whether something is true beyond a reasonable doubt without facts. This may be something that could be done in a small community. I have no doubt that I could probably say—if I went to a certain small community and lived there for a certain period of time—say, "Hey, the vast majority of people in this town would be incensed by this kind of thing." But the Court can't say it in Los Angeles in this day and age.

I sense, personally, that there probably is a charge taking place in this community in very recent months, but I can't say that was two years ago and I can't say how much of a change has taken place.

I don't know. And I just do not believe that, unless you have presented evidence to what this entire community believes, in this area, that any judge can say what goes on in the so-called, if I may, edge of this area of whether it's obscene or just pornographic.

I frankly, with all due respect, do not believe that because a film is shown or not shown or sold or rented on a shelf that that tells us that even the people who are in the

business believe that this is beyond the pale, not when you have laws against something that is beyond the pale and you are not sure what somebody else may think is beyond the [9] pale.

If I, as a video person, was selling these things and there was some questionable stuff over here that I might be prosecuted for, I would certainly, just out of sheer protection of my life, say, "Hey, it's not worth the risk," and not have it out there. It doesn't really equate with whether or not that falls within the community standard. So I cannot say beyond a reasonable doubt that the community standards were violated here.

As far as the Traci Lords business is concerned, the motion is denied, and I believe that the government's position legally and at this point factually is correct, and we should proceed on that basis, and I'll take five minutes and we will start.

MR. FLEISHMAN: Can the doctor be excused right now?

THE COURT: Sure I thought he would be gone by now.

MR. SCHWARTZ: We would then call Ruby Gottesman to the stand.

THE COURT: All right.

THE CLERK: Would you raise your right hand.

RUBIN GOTTESMAN, sworn.

THE CLERK: Would you state your full name and spell your last name for the record.

THE WITNESS: Rubin Gottesman, G-O-T-T-E-S-M-A-N.

[10] **DIRECT EXAMINATION**

BY MR. SCHWARTZ:

Q. Mr. Gottesman, if you would just pull that microphone closer to you.

A. Is this all right?
Q. Yes. How old are you, sir?
A. I'm 56.
Q. Where were you born?
A. New York City.
Q. Are you married?
A. Yes.
Q. And how long have you been married?
A. Thirty years.
Q. Do you have any children?
A. I have two children.
Q. Can you tell me something of the breakdown of these children?
A. I have a daughter, who is in the courtroom, Gail, she's 24, and I have a son, David, who is 20.
Q. Did you have any other children?
A. I had another son, Howard, who was 27.
Q. And what happened to Howard?
A. He was killed.
Q. Can you tell me about your—the extent of your education?
[11] A. I did go up to the second year in high school.
Q. So you quit in what grade?
A. I think it is the tenth grade.
Q. Now, were you ever in the armed forces of the United States?
A. I was in the Army during the Korean war.
Q. And what is your occupation, sir?
A. I'm a salesman.
Q. And how long have you been a salesman?
A. About 35 years.
Q. Do you own or operate any company?
A. I own and operate X-Citement Video.
Q. And what is X-Citement Video?
A. It is a video company.

Q. A video company?

A. It is a videotape company that is called a one-stop.

Q. Now, does X-Citement Video produce or manufacture any videotapes?

A. No, we don't.

Q. Exactly what is the function of the company such as that?

A. Well, what we do is buy from manufacturers and sell to the video stores.

Q. And approximately how many videos stores do you sell to?

[12] A. We have approximately about 5,000 to 6,000 customers.

Q. Now, prior to forming the company, X-Citement Video, what did you do?

A. I sold 16 millimeter movies.

Q. Sexually explicit movies?

A. Yes.

Q. And for how long a period did you do that?

A. About eight years.

Q. Now, did there ever come a time that you met or heard of a lady by the name of Traci Lords?

A. Yes.

Q. Can you tell the Court, please under what circumstances that came about?

A. Well, we were introduced at one of the trade shows, and then she came over my office one day. She was working in the Valley and she dropped by.

Q. And when was this, exactly, to the best of your recollection?

A. About three years ago.

Q. From that first meeting, until the present time, how many times would you judge that you saw Traci Lords and discussed things with her?

A. Well, between 40 and 50 times.

Q. Now, can you tell me what sort of a relationship you had with her?

[13] A. Well, it was a good relationship. She used me sort of as a confidant where she would come to me with her problems, and I would try to help her out. She had a lot of problems.

Q. What kind of problems?

A. Well, she had a problem with her mother. Her mother was always asking her for money, she had a problem with her husband, and she had a problem with drugs. She was having problems with producers not paying her the full amount of money that she thought she was supposed to get. And just run-of-the-mill problems of something working in the business.

Q. Now, specifically as to any problem involving drugs, what kind of problems was she experiencing?

A. Well, she had a drug habit. She had a cocaine habit. She was losing weight; she was gaining weight. She would try to lose weight because she wanted to be a fashion model, so she was taking drugs in order for her to lose weight fast. And I told her that is the wrong thing to do because, when you stop, you are going to gain it back. That's why her weight fluctuated so much.

Q. So based upon your observations, she was always going up and down in weight; is that right?

A. Absolutely.

Q. Did she express these anxieties to you about her weight [14] problem?

A. Yes. Because she had a couple of medical problems, because she had a weight problem.

MR. PITT: Objection. Motion to strike.

THE COURT: Sustained.

BY MR. SCHWARTZ:

Q. Now, did there ever come a time that you assisted her financially?

A. Yes. She came to me one day in tears and said that she had an opportunity to go to London, England for a modeling job, and she didn't have any money to go. And I couldn't believe it because she's been working—she must have, at that time, had had at least made 100 movies and still making movies. And I asked her where the money was? She said, "I need this job. Could you lend me $3,000." And I asked where. She said London. And I asked when are you going to give it back to me? And she said she would send it from London and give it to me in 30 days. And she would call in me two weeks. I balled her out. I told her she made a lot of money. What happened to all of it? And I finally gave her the money.

MR. PITT: I'm going to object to the hearsay and strike the entire answer.

THE COURT: What's the hearsay, Counsel?

MR. PITT: The hearsay is when she was going to pay [15] it, where she was going, what she was doing—

THE COURT: It was offered—I thought it was offered because she told him that.

MR. PITT: What's the relevancy if it's not offered for the truth?

MR. SCHWARTZ: It goes to the nature and extent of—

THE COURT: If it goes to his frame of mind eventually.

BY MR. SCHWARTZ:

Q. Was the debt ever paid back?

A. Well, what happened was she did call me from London and told me the modeling job didn't work out and she would be coming home. And she did come home two week after that and she came over and she paid me back the $3,000 and then besides that offered to lend me money.

Q. Now, how many films do you know of that were made of Traci Lords?

A. My educated guess—and I'm pretty well educated in that area, especially with her—I know for a fact is over 120 movies that she made. And then from the 120, what they did was they took parts of the 120 and they made another 50. There's at least 170 with her in it.

Q. Now, based upon your knowledge of her films, how would you rate her in the category of popular performers who are [16] in these films?

A. She was number one and there was no number two. She was so far ahead of everybody else.

Q. So far ahead in what way?

A. Her movies out sold every other movie made 10 to one. They sold in the millions.

Q. Now, in your own experience, how many Traci Lords films would you say that you sold through your one stop?

A. It's hard to estimate because when a Traci Lords movie would come out, normally we would buy 50 of a number—of a normal movie when her movie came out the initial order was 100, and then we backed it up partly with maybe another 200 or 400 more, depending on the movie. They always sold out and resold. The old ones were selling just as quick as the new ones.

Q. Were they always kept on stock?

A. Yes.

Q. Now, did there ever come a time when you heard stories concerning Traci Lords' age?

A. Yes.

Q. And can you explain that to us, please?

A. One day you come in and the phone is ringing and somebody saying, Did you hear the rumor about Traci Lords? I said, I didn't hear anything. And somebody else comes in and the same thing. There were rumors flying around.

[17] Q. What precisely were the rumors?

A. Is that she's underage.

Q. She was under the age of 18?

A. That she was under the age of 18 when she made these movies. And then I heard about another movie that she said she was over the age of 18 that came out around the same time period and which was totally confusing.

Q. Now, what did you do to try to confirm these rumors?

A. I tried calling her to check it out, and I couldn't get through. Her number was disconnected. Then I got calls from her lawyer, from her press agent. She—all of a sudden, she had a lawyer and a press agent and a manager.

Q. Now, did you try to get any confirmation through people in the business?

A. Nobody seemed to know. Nobody knew for sure. There were calls coming from all over the country.

Q. Insofar as the adult business is concerned, are rumors fairly commonplace?

A. Yes.

Q. Can you give examples?

A. There's a bust in Dallas, and these movies are no good here or there. I had a conversation before this trial even started, I said, "What movies are no good and what are good?" He says, "They're all no good. So there's your answer. We don't know. We don't know anything." The [18] business is so erratic that you never know what's going on, and the only way you know things is from rumors, and sometimes you don't believe them.

Q. Now, did you ever—or do you ever take steps to try to protect your customers when you hear these rumors?

A. Yes. We have a service business and our customers—we are in business with the video—X-Citement Video has been, eight years. And we try to keep our customers. It is a very competitive business. There's another 20 to 30

one-stops just like me, and they steal customers left and right. So in order to protect our business and keep our customers, we got to try to make them more personalized, more friendly to the customers.

Q. Now, with reference to this, did you take any steps in reaction to the rumors that you heard to notify your customers?

A. Well, to be on the safe side, you never know what is going on. So, you have to tell them, "We're not sure. We don't know. But maybe you should pull the tapes from the shelves and put them away for a while to see what happens. Don't send them back. Hold them and see what happens."

Q. Did people do that?

A. They said some day—some said they are waiting for the government to come down from the state or the government. So they continued to rent movies. What [19] happened was they stopped manufacturing them. And these people who continued to rent them, I just found out they are renting them because the people buying the—people renting were keeping them.

Q. For what purpose?

A. They felt they couldn't get them anymore. Instead of giving them back to the store, they paid the money and bought the tapes. So the video store ran out. It was in the last couple of months. But up to that time they were still renting them in every city.

MR. PITT: Object to hearsay. No foundation. Motion to strike.

THE COURT: Are you going to try to rehabilitate the situation?

BY MR. SCHWARTZ:

Q. Do you know what goes on as far as the types of materials being rented by various rental outlets throughout the United States?

A. Yes. I constantly monitored it on the telephone.

Q. And how many calls a day do you make concerning that?

A. Fifty to 100.

Q. And during the course of these—this in monitoring or inquiries—have you had an occasion to inquire about the activity on Traci Lords?

A. Yes.

[20] Q. And what specifically would you inquire as to?

A. Inquire what was going on with it. Nobody seemed to know it was legal in Europe, a lot of these movies that were made here, the manufacturers made them, they shipped them to Europe. They shipped masses to Europe. In Europe they never stop playing them.

Q. In the United States, how do you know Traci Lords films are continual—how do you know, of your own knowledge, that Traci Lords tapes were continuing to be rented following these—

A. From my customers.

Q. They told you?

A. Yes.

Q. Now—

THE COURT: The motion to strike is denied. It seems to me that he's established a certain expertise on the subject, and he's not called as an expert in a sense, but he's kind of—but I think he shows that he has expert knowledge on this subject.

BY MR. SCHWARTZ:

Q. Now, did there ever come a time that you requested that your customers were free, if they chose, to return tapes to you for credit?

A. Yes.

Q. When did that happen, to the best of your [21] recollection?

A. Well, right after the rumors started, we didn't know what to do. So the manufacturers started getting together and saying they would take a limited amount of Traci Lords movies. And there were some conditions. They had to be in good shape. That meant if the tape had been rented 50 times, you could tell from the wear and tape—the tape can last for ever. So a lot of these tapes were rented and her tapes were rented mostly every day. They were rented at least 50 to 100 times. Manufacturers were drawing the line. They said they are make—they made their money on these tapes. If there were relatively new ones coming out before the rumors, they were going to take those back. But the older ones out for two years and were in the stores and constantly rented and people made thousands of dollars, they had no right to ask for a full credit.

Q. How many tapes did you take back in exchange for credit?

A. I must have taken back $5,000.

Q. $5,000?

A. At least.

Q. Now, can you tell me what you—

A. Excuse me. I sell about 3,000 tapes a week out of the place.

THE COURT: Wait, wait. He took back 5,000 Traci [22] Lords tapes?

THE WITNESS: Yes.

THE COURT: And you sell 3,000 Traci Lords tapes—

THE WITNESS: No. 3,000 various tapes, of X-rated tapes, every week now at that time.

BY MR. SCHWARTZ:

Q. So 3,000 is about the volume of tapes that you sell a week?

A. Yes.

Q. Now, when these rumors filtered down and you heard about the rumors concerning Traci Lords' age, what did you believe those rumors were represented?

A. Absolutely false because I knew her.

Q. And what was the purpose of these rumors, as far as in your own mind?

A. What happened was this girl—or this woman, she had no money. She worked her head off for two years, and she kept on telling me she wanted to make a lot of money and quit. I says, "Quit now." She said, "I can't. I don't have any money." And she she told me she wanted to be a millionaire. She said, "You watch. I'll come up with something."

And all of a sudden, I hear a rumor that she has her own company, TLC, Traci Lords Company. I was—I aware of it, and they produced a movie. The movie was made in [23] Paris. And they day after this rumor started, that her birthday was in June or something, this movie comes out and this belongs to her. And Caballero, who was probably in a state of receivership at that time, took over the movie. And the figure I have of last week, they sold 100,000 copies of this movie. And I know for an exact that she got $10 a piece, every copy that was sold, royalties. So she made her million dollars. She—she was like—this—the way—every other movie in her mind became illegal. And this movie not only sold out—I sold approximately 6,000 pieces of this movie, more than any other movie in the history of my company. It just—and it continues selling. I just bought 50 yesterday. Got to buy them in 50s to get a discounted price. And I buy 50 at least once a week, and we sell them out. What it is is this is the movie that now people are buying because they feel that—it is the only movie that's out there. And just sells out. They don't rent it. They buy it.

Q. So, in effect, you are saying you helped create her own monopoly?

A. Exactly. She changed the name to Traci Lords. She's capitalizing on her name. She made a couple of TV talk shows. It doesn't hide the fact that she was in the X-rated movies. She's using that inhouse in Vegas in the last CS shows. There's people signing autographs. She's [24] in a section that is closed to the X-rated section. And she's signing autographs for aerobics tapes and her line must have been as long as all the other lines combined.

Q. Now, during the course of these rumors, did you ever get—were you—was it ever confirmed to you her age from any source?

A. Nobody ever told me her age. Nobody told me that she was underage.

Q. But what did you believe about it?

A. I knew she was overage because I knew her.

Q. How do you know?

A. She told me. She said, "Don't believe all this. This is my way to make a million dollars."

Q. Why didn't you tell everybody else if that was the case?

A. In this business, you really don't tell too many people—I made money on it. I tried to recoup some of the movies I lost on the $5,000. So I sold 5,000 of the other ones.

Q. Well, did there ever come a time when you met someone that identified himself as Steve Suzuki?

A. Yes.

Q. And when did you meet him, to the best of your knowledge? I don't want to go in all of that relationship. Just those years now.

[25] A. I was trying to do that during the trial. When we just moved to Van Nuys, it was the latter part of 1985.

Q. Now, you were present in court when you heard Officer Takeshita tell you that he felt you were on to him as him being a police officer and that you frisked him. Did that ever take place, to the best of your knowledge?

A. That was the funniest thing in my business.

Q. Why is that?

A. If you touch anybody, you are deemed gay and you sell movies you would be the laughing stock of the industry. If I thought he was a cop, I would tell him right out, "Get the hell out of here."

Q. Now, insofar as your business is concerned, does anyone need to be identified to come in and buy a tape?

A. No way. They could walk right in the door.

Q. And how do they gain access to see you?

A. They just come in and they ask for me and they come in. I have nothing to hide.

Q. Do you give access to your shelves so that people can see what is on the shelves?

A. That's the only way you sell tapes. It is just like a video store.

Q. Did you give that access to Steve Suzuki?

A. Absolutely.

Q. There came a time, wasn't there, that you sold him some [26] Traci Lords tapes?

A. Yes.

Q. In the–

A. Excuse me. Before this time, I've known him approximately two years. I mean, he was coming in–there's a lot of–the testimony stated in this courtroom was maybe six months after the fact, eight months after the fact. The testimony is when he started the wiretapping he came in eight months before that. He bought a lot of tapes from me.

Q. Did you ever tell him that Traci Lords was underage?

A. I think–I may have told him that there is a rumor going around that she's underage. But what happened was he was upstairs. He had the free run of the place, just like any other customer. He looked around and looked around, and he was looking upstairs for other tapes. We kept tapes upstairs. We would take downstairs depending–the tapes we kept unstairs were mostly defective that we were going to return. And he always looked through it because he was looking for certain tapes. He didn't care if they were defective or not. He goes upstairs and finds a box of Traci Lords tapes we didn't return. And what happens is, the manufacturers, they shut it down. They made a time limit. And the time limit was, if you didn't return the tapes by a certain day–because they were losing a lot of [27] money on the return tapes, you cannot return any tapes. And then a whole box load I brought back from Texas because he was my best customer, the fellow that testified here, and I had no choice but to take back his tapes. And these tapes were so worn and you can tell that they were shot. He was a good customer. I gave him a $40 credit on every one of these tapes. I took them into the place and they laid upstairs. Couldn't sell them. Didn't know what to do with it. And Steve came upstairs, and he looked in and he seen these tapes. He said, "You want to sell them?" I said, "Not really." He says, "Well, they are going to Hawaii. We are shipping them there and will be fine." I said, "The only way I'll do it is if you take them all and you could pay me $1,000." I knew a lot of these tapes were defective, and I didn't want them to come back. I figured if he pays cash, he can't stop the check. I didn't know whether the tapes were good or bad. I couldn't give them back, so that's why I asked for cash. I said–to keep the deal final, get rid of these tapes. And that's it.

Q. Did you discuss with him the fact that you were afraid to ship these tapes?

A. Yes, because you never know what is going on. The Meese Commission is out there, and it was, like, bad times. The timing was like—nobody knew what was going [28] on. Nobody was getting busted on Traci Lords movies. Nobody. Nobody was doing anything about it, and nobody—the rumors were consistent. And people—no law came down. No directive came down. These people—a lot of these are mom-and-pop stores. What they've done is 30 percent of their business is X-rated business. They can't afford to lose any of this business; otherwise, they would be out of business. I don't care what anybody tells you, 35,000 stores sell X-rated tapes, and what it is is they are embarrassed about it. They're ashamed about it. But yet they sell them. They keep them in the back. They keep them in the side. Some people keep them under the counter, but they go out.

Q. But, specifically, what does that have to do with having told Steve Suzuki that you didn't want to ship these tapes because this was kiddie porn and she was underage when she made them?

A. I felt that's what he wanted to hear just to get rid of him. It is like a sales talk. I wanted the things out of there. I gave a $40 credit on them. I gave it to him for $20. I lost $20 on it, and I salvaged what—some money back. And I knew he was always asking for kiddie things. He was asking for tapes that would—with animals in it and with defecation, urination, anything that—with young girls. He would say, "Which ones have the younger ones?" [29] He took a tape called Little Kimmie Johnson. The girl was short. Nothing to do with underage. And he bought five copies of it. When he found out it was a small girl—the girl was 21.

Q. And that was the little—the girl in Little Kimmie Johnson?

A. Yes. She's little because she was 5 foot tall.

Q. Were you interested in doing Mr. Suzuki any favors?

A. Well, at the beginning he was a good customer, and then he became a pain in the ass. He stopped buying. He was only buying odds and ends. But he also promoted me that he's going to open a big distributorship in Hawaii and when he opens there are a lot of people coming from Japan. In fact, he told me he just came back from Japan and he was going to buy a lot of tapes and stock this in Hawaii. And I felt I—you know, promote him for a good sale. And I read him—whatever he wanted to hear, I told him. But after a while he became a pain in the ass, and I seen that he wasn't buying anything—everything, like odd-ball things.

Q. Did he tell you to come fix up an order to him, that he was coming back to see you? Did there come a time?

A. Yes.

Q. When he came back, did you have that merchandise waiting?

[30] A. No, because I felt he was just ordering stuff that I wasn't stocking. I didn't have any more Traci Lords movies. I wasn't going out to go get them. And I didn't have the stuff he wanted. So, when he came back, I had nothing for him. I didn't care about him anymore. I felt he was using me.

Q. Now, at the time that you sold those Traci Lords tapes to the undercover agent, how old did you believe Traci Lords to be?

A. Over 18.

Q. And why did you believe that?

A. Because she told me.

Q. And when did she tell you that?

A. All along.

THE COURT: Where is Traci Lords now?

THE WITNESS: Are you asking me, your Honor?

THE COURT: Yes, sir. Where is she? Do you know?

THE WITNESS: The last I heard, she's in Redondo Beach.

MR. SCHWARTZ: Do you know where Traci Lords is now?

THE COURT: He just said—he said—the last he's heard, she's in Redondo Beach.

BY MR. SCHWARTZ:

Q. As far as her marital status, you mentioned that she [31] was married?

A. She is married to Tom Byron. That's what she told me. It was a secret marriage, and she didn't want anybody to know about it because she worked with other people in the movies. But if you notice, I think every single movie that she originally made, Tom Byron is in the movie.

MR. SCHWARTZ: Thank you. I have no further questions.

MR. FLEISHMAN: I have no questions, your Honor.

* * * * *

[149] MR. FLEISHMAN: If it is agreeable, first of all, on behalf of the defendant X-Citement, we now move pursuant to Rule 29(b) for a judgment of acquittal, and that may be taken under submission. And I would like permission if it is convenient to the Court to really not make any oral argument because my part of the argument will be legal and I would like a 10-day period in which to file a memorandum and it would be essentially an elaboration of the argument I've put forward. But I've never had a chance to put it forward as fully as I would like. I would ask for permission to present argument in lieu of a closing argument, a legal brief, but within 10 days on the issue of [150] the unconstitutionality of standards on its face and as applied.

THE COURT: What about the government? How would they like to proceed?

MR. PITT: Your Honor, Mr. Fleishman has entered a motion Rule 29 based upon the evidence at the close of the government's case. He's now presented evidence of Mr. Gottesman's testimony only. Unless it refers specifically to Mr. Gottesman's testimony, I see no reason to continue a Rule 29 motion for 10 days in order for him to make any submissions.

MR. FLEISHMAN: Well, I could make my argument now. I think it will be helpful to the Court.

THE COURT: Well, I have no problem with people submitting briefs on legal issues at the end of a case or at any time, but I do think that we should probably argue those things which are going to be orally argued now and get that over so that there's no need for people to come back into court although, if you are going to render a decision in a criminal matter, you really have to have everybody present.

MR. FLEISHMAN: If the Court, please, Mr. Schwartz is going to argue the factual aspects of the testimony with regard to knowledge. I would just like to, for the moment and on the assumption that I'll have 10 days in which to [151] brief it, to pinpoint what I think is the key argument on the scienter.

THE COURT: The only problem that I have is that you already have done that thoroughly within the last 24 or 48 hours, haven't you?

MR. FLEISHMAN: I think that I—my oral argument would not be helpful. I think my written argument in 10 days would be helpful, if I could preserve that.

THE COURT: What will be different than what's already in the—

MR. FLEISHMAN: I think the key thing where I think there is a disagreement between the Court and myself is

in terms of whether the statute is unconstitutional on its face on the scienter point. I think that has to be demonstrated from my point of view, and I hope that it would so demonstrate as the Court would see it. Congress indeed intended to eliminate scienter. They intended to, and I think we could demonstrate that.

* * * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-295-Kn
Volume 12

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RUBIN GOTTESMAN, INDIVIDUALLY AND DOING BUSINESS AS R.G. SALES COMPANY, STEVEN ORENSTEIN, AND X-CITEMENT VIDEO, INC., DEFENDANT

Honorable DAVID V. KENYON, Judge Presiding

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[39] * * * * *

THE COURT: All right.

We have, as I understand it, the only issue now to decide is whether or not Mr. Gottesman and the defendant corporation is guilty of violating 2252. The Court is going to simply make the rulings and then possibly do some explaining.

The argument that 2252 violates the First Amendment, the Court does not agree with and that motion to dismiss on that basis is denied.

The Court finds that the indictment is pled—was pled sufficiently, that the statute requires knowledge on [40] the part of a distributor, and not only that there was child pornography and that as such would constitute sexually explicit photography of a minor as the person under 18

years of age, and—that requires knowledge of the fact the person was a minor.

The Court finds beyond a reasonable doubt that Mr. Gottesman knew or had reason to believe and did believe that Tracy Lords was a minor at the time. The evidence is fairly clear on that, quite clear as a matter of fact.

The Court finds that she was in fact a minor at that time. Regardless of the evidence that was adduced here today, I think that the evidence was sufficient. The mother's testimony was quite credible on that subject. There were other indicia of it: driver's license, birth certificate. The Court is convinced beyond a reasonable doubt that at the time she was a minor.

The Court believes that the statute was not simply designed to protect very young, shall we say, minors, but minors up to and including the age that Tracy Lords certainly was at the time, and that perhaps the real question is not a matter—it is a matter of seriousness, the case was, as opposed to, I'm sure, the younger you get, the more serious it gets in the sense that, if you have very, very young children, I have no doubt that the public would be—the vast majority of the public would be [41] incensed. She was close to the age of 18 and was—and that I think goes to the matter of how serious it was. But nonetheless I believe it is within the law. I think the law was designed to protect children. And until they are adults, that's what they are.

The Court finds that Mr. Gottesman is, as well as the defendant, guilty of violating that section of the law, and I'm going to ask the government to prepare proposed findings of fact and conclusions of law.

We will set this matter for sentencing at some time that is convenient to the parties.

* * * * *

Schoolgirl to porn queen

Davis Barber / Staff photographer

Traci Lords is shown in one of her many pornographic movies, all of which have been pulled from video store shelv

South Bay sex star was girl next door

By Dirk Broersma
Staff writer

By all accounts, Traci Lords is a charming young woman.

Even after her transition from a Redondo Beach schoolgirl to an American porn queen, friends and neighbors say she never seemed to lose her smile or innocence.

"She was as sweet as could be, the best neighbor you could ever want," said her former next-door neighbor on 162nd Street in Lawndale.

"She was absolutely the all-American girl," said the manager of the Highridge Apartments in Rancho Palos Verdes, where she lived until recently with a boyfriend.

These impressions contrast with the unsettling revelation last week that Lords made most of her 75 nationally distributed sex films while she was still a minor. News that one of the country's biggest sex stars made movies while as young as 15 prompted authorities to warn retailers they would be prosecuted if they continue to sell or rent any of Lords' films.

District Attorney Ira Reiner said his office has begun an investigation into the sex film makers who had "exploited" her. Although Lords offered false identification as proof she was of legal age, Reiner suggested that porn movie executives advised her to obtain a phony ID.

"They were using an attractive 15-year-old girl," Reiner said. "She was grist for the mill as far as they were concerned."

Authorities say Lords carried a state identification card with the name Kristie Nussman and a birthdate of Nov. 17, 1962, although she actually was born on May 7, 1968, in Steubenville, Ohio.

Lords is in seclusion and unavailable for interviews, according to her attorney, Leslie H. Abramson.

She reportedly moved to California with her mother and three sisters several years ago after her mother was divorced. They settled in north Redondo Beach.

Traci Lords' X-rated career started early

One of the earliest recollections of Lords came from a teacher who remembered her as eighth-grader Nora Kuzma, Lords' real name, at Lincoln Elementary School in Redondo Beach. In a letter to *The Daily Breeze*, the teacher said she discussed the sex star with Lords' younger sister. The teacher requested anonymity.

She "would speak to me about Nora and mentioned the fact that she quit school because she was making so much money. She gave me more information after [illegible] her sister up from her graduation dance and I commented that she had really changed since the eighth grade.

"I believe she did not realize that her sister was in sex movies, even though she mentioned films," the teacher wrote.

After graduating from Lincoln, Lords attended Redondo Union High School for two years before dropping out as a sophomore in 1983. Classmates there remember the voluptuous Lords as an attractive girl, who had boyfriends but few girlfriends.

Friends recall she was not a disciplin-

Porn / A1?

Porn

From page A

problem and that she was an average student, although she wasn't involved in any extra-curricular campus activities.

"She sat right by me in our world history class. She seemed nice and everything," Rana Chapkhaneh said.

"She had no reputation of being a slut or anthing like that. She seemed to me to be a regular girl. . . . (But) she pretty much hung out with guys," said another former classmate, who requested anonymity.

For a time, Lords ran with the heavy-metal crowd, although she shunned the distinctive clothes worn by teen-age fans of heavy-metal music, an acquaintance said.

After she dropped out of school, Lords ran away from home and began using the name Kristie Nussman, according to friends.

Department of Motor Vehicle records show Lords was issued the Nussman identification card on Jan. 25, 1984. The identification shows Lords resided in the 4500 block of West 162nd Street in Lawndale.

It's unclear when Lords began making pornographic movies, although classmates at Redondo Union say word of her new occupation circulated on campus after a centerfold photo of her appeared in the September 1984 issue of *Penthouse* magazine — the same issue that featured nude pictures of former Miss America Vanessa Williams. Although the article stated her age as 22, Lords was just 16 when the pictures were published.

Sometime after that, the first of Lords' porn films began to appear at local video stores.

"It was really funny," recalled a former schoolmate, "I was working in a video store and that's when I saw her picture on these movie cassettes. I said, 'My God, this girl looks familiar.' It looks just like her with a little more make-up."

Dan Rennison said he saw his former Redondo Union schoolmate while watching porno movies at a friend's house.

"I said, 'Wait a second, that chick went to Redondo.' I tripped out — she's pretty hard-core," Rennison said.

While students say it was common knowledge that their former classmate was a porn actress, teachers and school administrators at Redondo Union could not recall anything about her.

Jerry Goddard, the school's vice principal at the time, said he was shocked to learn that Lords attended Redondo Union.

Nora Kuzma in 1983 Redondo Union High School yearbook.

"I almost fell over. But I did not know her or know of her. As the person in charge of discipline, I probably would have been the last person to find out."

Walter Hale, superintendent of the South Bay Union High School District, declined to comment about Lords.

After she left school, acquaintances say, Lords often could be seen with her boyfriend driving around in a black sports car, shopping at Del Amo Fashion Center in Torrance and hanging out at the beach.

Sherri Mullin, a former employee at the Video Mart in Torrance, said Lords and her boyfriend shopped at the store frequently. She recalled how Lords stopped her boyfriend from entering the adult film section in the store.

"She said, 'Don't go in there,' you know, like, don't bring home one of those silly things. She always played like she had nothing to do with it but of course we all knew," Mullin said.

Another time, Mullin saw Lords at the Chic Accessories jewelry store at Del Amo Fashion Center, where Lords was buying a necklace.

"She looked really stunning," Mullin said. "She didn't look harsh or anything like that. One time I remember she was wearing some really gorgeous white boots, white pants and a nice white sweater."

Mullin said many people knew Lords wa a minor.

"I thought it was kind of funny that sh was my age and doing all this. But I neve said anything to her about it," she said.

Dave Ondo, manager of Video Mart, sai he became acquainted with Lords at a trac show in Las Vegas in January 1985. He calle her "bright" and "witty."

"Because of her professionalism and the wa she carried herself, I just figured it couldn be true," Ondo said. "You don't get to be N 1 in that industry by being an underage amatet But she has proved us all wrong."

Since the news broke last week that Lor was underage when she made her movies, On said he has been flooded with requests for h movies.

"It's on everybody's lips. I mean even t guy who doesn't watch adult videos is comi in and talking about it," he said.

Neighbors in the modest Lawndale neighb hood where she resided until last year sa Lords lived with a boyfriend who appeared be unemployed.

"I guess he was just freeloading off he Sergio Peralta said. "He used to yell at her a lo

Peralta was unaware that his neighbor w a porn star: "So that was Traci Lords? H moly!"

Another neighbor in Lawndale said he w good friends with Lords and that she did attempt to hide her occupation.

"Nowadays, it's any way you can make buck. I hope all this publicity helps her," s the neighbor, who declined to give his nar

The neighbor said Lords lived in Lawnd until about nine months ago. She then apparer moved to the Highridge Apartments in Ran Palos Verdes.

The apartment manager at the complex s Lords rented a one-bedroom apartment w her boyfriend. Lords often played tennis worked out in the weight room at the comp said the apartment manager, who declinec give her name.

About three months ago, the manager s Lords and her boyfriend broke up and mo out of the complex.

"As far as I was concerned she was ju model," she said. "I was shocked to death w I read about her."

GOVERNMENT EXHIBIT 220

[From Los Angeles Times, July 18, 1986]

Sex Films Pulled; Star Allegedly Too Young

By DAVE PALERMO
Times Staff Writer

Video shops and adult movie stores and theaters nationwide were pulling products featuring sex film star Traci Lords from their shelves Thursday because of an investigation by the Los Angeles County district attorney's office into allegations that she was underage when she made most of her movies.

Los Angeles police say that Lords, considered one of the top adult film actresses in the country, made about 75 sexually explicit movies and videos before she turned 18 last May, and adult film industry officials are being advised to stop selling and showing her movies to avoid criminal prosecution.

John Weston, attorney for the Adult Film and Video Assn. of America, said distributors should pull any film made before May, 1988, featuring Lords "in sexual conduct, no matter how briefly."

Failure to do so, Weston said, would violate the "consenting adult" ethic of the adult film and video association and subject its members to "very punitive state and federal laws."

People who knowingly use a minor in sexually explicit films or publications or who distribute or sell such materials can be prosecuted under state and federal laws on either felony or misdemeanor charges.

District attorney's spokesman Al Albergate said the investigation involves "Miss Lords and anybody who employed her." But there are no plans to widen the probe to include the entire adult film industry, he said.

District attorney's investigators last Friday searched Lords' Los Angeles area home, the Sun Valley offices of Vantage International Productions, a major producer of adult films, and the Sherman Oaks offices of modeling agent Jim Southe, who is credited with discovering the actress in 1984.

Southe and other industry officials interviewed Thursday said that Lords, on seeking employment, provided a California driver's license, a U.S. passport and a birth certificate, which stated that her name was Kristie Nussman and gave a birth date of Nov. 17, 1962.

Los Angeles Police Vice Sgt. Don Smith said, "I know for a fact the ID used by this young lady is not hers."

Police Capt. Jim Docherty said Lords was a 15-year-old runaway from Steubenville, Ohio, when she came here in 1984 and began her adult film career.

"Now she's the hottest thing going," he said.

Lords, who until recently lived in Redondo Beach, is secluded at an undisclosed location and could not be reached for comment Thursday, her attorney, Leslie H. Abramson, said. The lawyer said her client is "very confused and very scared and very upset and embarrassed about the whole thing. . . . My client did nothing illegal."

The attorney declined to comment on allegations that Lords made sexually explicit films before she turned 18. She also declined to divulge Lords' age or confirm whether her real name is Kristie Nussman.

"I will say she's indisputably over 18 now and therefore is free to do whatever she chooses," Abramson said.

The lawyer also said she was curious as to why the district attorney's office is investigating Lords. She said it is a far more serious crime for adult film producers and agents to use underage people in sex films and suggested that her client is being used "in somebody else's paddle game."

Smith said it would be difficult to attempt to prosecute an agent, producer or distributor who uses a minor in a sexually explicit film if they were given documents indicating that the person was over 18.

The adult film association's board chairman, Jimmie Johnson, said the withdrawal of Lords' films from the market would cost the industry millions of dollars.

"There are a lot of people who have a tremendous amount of money invested in her," Johnson said. "They are the ones being defrauded. Hopefully, the authorities are looking at it from that angle."

Smith said Lords has made at least 75 films and videos, "55 of which are very big sellers."

Lords also appeared in the September, 1984, issue of Penthouse Magazine. Leslie Jay, spokeswoman for Penthouse publisher Bob Guccione, said Lords showed identification indicating that she was over 18 before the photos were taken.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CR-88-295-KN

UNITED STATES OF AMERICA, PLAINTIFF

VS.

RUBIN GOTTESMAN, ET AL., DEFENDANTS

Date: August 8, 1988
Time: 1:30 p.m.
Place: Courtroom of Judge David V. Kenyon

DEFENDANT STEVEN ORENSTEIN'S MOTION TO DISMISS COUNTS NINE AND TEN OF THE INDICTMENT UNDER THE NOTICE CLAUSE OF THE SIXTH AMENDMENT, THE INDICTMENT CLAUSE OF THE FIFTH AMENDMENT AND FOR FAILURE TO STATE AN OFFENSE

Defendant Steven Orenstein, by and through his attorney, respectfully moves this Court for an order dismissing counts nine and ten of the indictment in this case in the event that this Court declines to find 18 U.S.C. § 2252 unconstitutional for failing to require proof of scienter and judicially construes 18 U.S.C. § 2252 to require proof of knowledge of the character of the material and the age of the performer in order to support a conviction. Should this Court judicially construe the statute to remedy its present constitutional defect regarding proof of adequate scienter, then defendant contends that counts nine and ten of the indictment must be dismissed for

failure to state an offense in that those counts fail to allege that defendant had knowledge of the content and character of the materials at issue, or knowledge that the individual depicted was underage.

A brief in support of this motion is attached hereto.

/s/ J. Michael Murray

J. MICHAEL MURRAY
BERKMAN, GORDON, MURRAY and PALDA
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

Attorney for Defendant
Steven Orenstein

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CR-88-295-KN

UNITED STATES OF AMERICA, PLAINTIFF

VS.

RUBIN GOTTESMAN, ET AL., DEFENDANTS

Date: August 8, 1988
Time: 1:30 p.m.
Place: Courtroom of Judge David V. Kenyon

DEFENDANT STEVEN ORENSTEIN'S MOTION TO DISMISS COUNTS NINE AND TEN OF THE INDICTMENT AND THEIR CORRESPONDING FORFEITURE ALLEGATIONS ON THE GROUND THAT THE STATUTES UPON WHICH THEY ARE PREMISED ARE UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Defendant Steven Orenstein, by and through his attorney, respectfully moves this Court pursuant to Fed. R. Crim. P. 12(b)(2), for an order dismissing counts nine and ten of the indictment and their corresponding forfeiture allegations. The grounds for this motion are as follows:

1. Title 18 U.S.C. § 2252, the statute on which counts nine and ten are premised, is unconstitutionally overbroad;

2. Title 18 U.S.C. § 2252 unconstitutionally permits the imposition of criminal responsibility without requiring

proof of defendant's knowledge of the nature of the material involved or knowledge that the material involved an underaged actor or actress; and

3. Title 18 U.S.C. § 2253 unconstitutionally chills protected speech, effectuates a prior restraint, and is overbroad, and therefore, is violative of the First Amendment.

A brief in support of this motion is attached hereto.

/s/ J. Michael Murray

J. MICHAEL MURRAY
BERKMAN, GORDON, MURRAY and PALDA
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

Attorney for Defendant
Steven Orenstein

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CR-88-295-KN

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RUBIN GOTTESMAN, INDIVIDUALLY AND DOING BUSINESS AS
STEVEN ORENSTEIN, AND
X-CITEMENT VIDEO, INC., DEFENDANTS

MOTION FOR JUDGMENT OF ACQUITTAL BY DEFENDANT X-CITEMENT VIDEO, INC. PURSUANT TO RULE 29, RULES OF CRIMINAL PROCEDURE AND MEMORANDUM IN SUPPORT

COMES NOW the defendant X-Citement Video, Inc., and moves the court for a judgment of acquittal on counts 1 through 8, inclusive, pursuant to Rule 29, Rules of Criminal Procedure.

This motion is based upon all the files and record herein and the attached memorandum.

Fleishman, Fisher & Moest
Stanley Fleishman

By: _____
STANLEY FLEISHMAN
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CR-88-295-KN

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RUBIN GOTTESMAN, INDIVIDUALLY AND DOING BUSINESS AS
STEVEN ORENSTEIN, AND
X-CITEMENT VIDEO, INC., DEFENDANTS

(PROPOSED) FINDINGS OF FACT RE COUNTS 9, 10, 11

In this case, tried without a jury, the Court has heretofore entered a judgment of acquittal pursuant to 29(a), on Counts 1 through 8, on the ground that the evidence submitted by the Government was insufficient to sustain a conviction under said counts. Specifically, the Court concluded that it could not find beyond a reasonable doubt that the charged tapes were obscene under the three prong test announced in *Miller v. California,* 413 U.S. 15 (1973).

At the time the Court granted the motion regarding Counts 1 through 8, the Court denied defendants' motion for a judgment of acquittal pursuant to Rule 29(a) on Counts 9, 10, and 11. Thereafter, defendant Rubin Gottesman testified that he did not know Traci Lords was under 18 years of age at the time she made the films defendants transported in interstate commerce.

After considering all the evidence in the case, the Court concludes that it cannot find beyond a reasonable doubt

(1) that Gottesman knew Tracie Lords was under 18 years of age when she made the tapes defendants shipped in interstate commerce, or (2) that she was in fact under the age of 18 when she made said tapes. Accordingly the Court finds defendants not guilty on Counts 9, 10, and 11.

The Court now makes its Findings of Fact and sets forth its reasons for finding defendants not guilty on Counts 9, 10, and 11.

FINDINGS OF FACT

1. Count 10 and 11 of the indictment alleges that defendants conspired to violate the Sexual Exploitation of Children Act, 18 U.S.C. § 2252, and Counts 9 and 10 allege a violation of said section.

2. Title 18 U.S.C. § 2252 provides in relevant part:

> (a) any person who—
>
> (1) Knowingly transports or ships in interstate . . . commerce . . . any visual depiction, if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct. . . .
>
> shall be punished as provided in subsection b of this section.

3. In Count 10 of the indictment the Grand Jury charged that defendants "did unlawfully and knowingly distribute visual depictions that had been transported in interstate commerce, the producing of said visual depictions involving the use of a minor engaging in sexually explicit conduct . . . and that such visual depictions were of such conduct."

4. In Count 11 of the indictment the Grand Jury charged that defendants "did unlawfully and knowingly

ship in interstate commerce from Los Angeles, California, to Honolulu, Hawaii, visual depictions, the producing of said visual depictions involving the use of a minor engaging in sexually explicit conduct . . and that such visual depictions were of such conduct."

5. The elements of the crime of violating § 2252 are as follows:

1. That the defendant knowingly distributed visual depictions that had been transported in interstate commerce, or had been shipped in interstate commerce, visual depictions.

2. That the visual depictions were of sexually explicit conduct as that term is defined in the Act.

3. That the production of the visual depictions involved the use of a minor under the age of 18 engaging in the sexually explicit conduct.

6. Although the indictment does not allege that defendants *knew* that the visual depictions involved the use of a minor under the age of 18, the Court ruled in deciding a pre-trial motion that the Government was required to prove beyond a reasonable doubt that the defendants knew that the person depicted in the charged tapes was under 18 years of age. *See* Government's Response to Motion for Judgment of Acquittal at 5.

7. The Government proved beyond a reasonable doubt:

1. That the defendant knowingly transported in interstate commerce, and shipped in interstate commerce, visual depictions of a person identified as Traci Lords.

2. That the visual depictions were of sexually explicit conduct as defined in the Act.

8. A. The Government did not prove beyond a reasonable doubt that defendants knew that Traci Lords was a minor under the age of 18 when she made the tapes introduced into evidence.

In the tapes Traci Lords was presented as an experienced woman, and the box in which the tapes were enclosed stated that all actors were over the age of 18. According to Government Exhibit 220 (*Los Angeles Times*, July 18, 1986), video shops and adult movie stores were pulling product featuring Traci Lords because of an investigation by the Los Angeles County District Attorney's Office into allegations that she was underage when she made most of her movies. Tracie Lords was, according to the story, one of the top adult film actresses in the country, having made about 75 sexually explicit movies and videos while she was allegedly under 18 years of age. Gottesman testified that she in fact had made 110 such films prior to the time rumors surfaced suggesting that she may have been under 18 years of age.

Gottesman testified that in real life, and in the films, she appeared physically mature, and her demeanor, sophistication, and apparent sexual experience belied her minority. Shortly before the rumors started circulating, Traci Lords told Gottesman in person that she was going to take action to make a million dollars, and that he should not believe the stories he might soon hear about her. At about that time Lords showed Gottesman her passport, which revealed that she was 20 years of age. Gottesman knew that at the time her first tapes were released, sexually explicit pictures of Lords appeared in *Penthouse*, a nationwide publication. He also knew that for some two years her tapes were distributed nationally with immunity and that despite her extreme popularity and reknown, no one suggested that she was a minor prior to the time the rumors surfaced.

Gottesman testified that he believed Traci Lords, and those around her, planted a false story that she was underage when she made the 110 tapes, to drive them off the market so that they would not compete with the new hard-

core films she intended to make, and did make, which enriched her.

The newspaper stories relied upon by the Government to support its assertion that Gottesman *knew* that Lords was underage when she made the tapes introduced into evidence, proved at most that Gottesman was on notice that Lords may have been underage. Government 220 (the *Los Angeles Times* July 18, 1986 story) states that Lords was "*allegedly* too young," and that she "*may* have been a minor." The story states "Lords, on seeking employment, provided a California drivers license, a U.S. passport, and a birth certificate, which stated that her name was Kristie Nussman and gave a birth date of November 17, 1962. The story states that Lords' attorney "declined to comment on allegations that Lords made sexually explicit films before she turned 18," and "declined to divulge Lords' age or confirm whether her real name is Kristie Nussman." The attorney did state that Traci Lords was then "indisputably over 18." Officer Smith was quoted as stating "it would be difficult to attempt to prosecute [a] . . . distributor . . . if they were given documents indicating that the person was over 18." Finally the article states that "Lords also appeared in the September 1984 issue of *Penthouse Magazine*," and that a spokesperson for *Penthouse* said Lords "showed identification indicating that she was over 18 before the photos were taken."

Gottesman, unlike those who arranged for Traci Lords to appear in sexually explicit materials, does not have the burden of affirmatively proving that he had a reasonable, good faith belief that Traci Lords was over 18 years of age. Similarly, unlike those who produced the films, Gottesman need not prove that he acted with appropriate prudence in making certain that Lords was of age when she appeared in the films he distributed. *See, U.S. v. U.S. Dist. Court for Cent. Dist. of Cal., supra,* at 542-543.

It may be that on the record in this case a trier of fact could find that the *producer* of a film had not met *his burden of proving* a "reasonable, good faith belief" that Traci Lords was over 18 years of age. But the record does not support a conclusion that the *Government proved beyond a reasonable doubt* that Gottesman knew that Traci Lords was underage when she made the films. Traci Lords looked like she was over the age of 18, she acted as if she was over that age, and before the rumors started, everyone believed her to be over 18. At most, the record would support a conclusion that Mr. Gottesman should have been suspicious as to Traci Lords' true age, but that suspicion is an insufficient basis to find beyond a reasonable doubt that he *knew* Traci Lords was underage. Suspicion and skepticism is not an acceptable basis upon which to find something is true, "beyond a reasonable doubt."

B. The Government also failed to prove beyond a reasonable doubt that the tapes introduced into evidence were made at a time when Lords was in fact under 18 years of age. The sole evidence introduced by the Government on this aspect of the case was Traci Lords' mother who was shown various scenes of Traci Lords and gave her opinion that she appeared to be 16 years of age in some and 17 years of age in others.

The Government attempted to bolster this aspect of its case by introducing certified copies of copyright registrations, which would purportedly identify the time the various films were made. The Court excluded this evidence, finding that without a showing that the certified copies of the copyright refers specifically to the actual tape before the Court, such evidence is inadmissible.

Without more proof than the testimony of Traci Lords' mother, the Court cannot say beyond a reasonable doubt that Traci Lords was in fact under 18 years of age when she made the tapes introduced into evidence.

9. The Court questions whether the Act applies to a case like this one, where the actress engaged in a deliberate successful effort to decieve the adult industry comes within the reach of the Sexual Exploitation of Children Act. *See, U.S. v. U.S. Dist. Court of Cent. Dist. Cal., supra,* at 543. As the Court noted, the Traci Lords tapes are fully protected by the First Amendment and their suppression would violate the First Amendment unless justified by a compelling societal interest.

In *United States v. Kantor, supra,* Judge Letts questioned "the societal interest in protecting children, which constitutes the justification for restricting rights otherwise secured by the First Amendment, extends to persons between the ages of 16 and 18." *Id.* at 1428. He stated that when Congress amended the Act in 1984 by raising the specified age from 16 to 18 the legislative history could be interpreted as designed to reach cases "involving people 13 to 14-years of age. *Id.* at 1429 n. 42. Stating that "there comes a point at which the prohibition against employing underage performers" does not serve a sufficiently legitimate governmental interest to justify suppression of protected speech, he concluded that "that point is reached when the affected performers are sufficiently 'adult' so as to be no longer the legitimate subjects of protection of 'children.' " In the interest of protecting children he stated Congress "can prohibit the use only of those who truly are children in such performances." *Id.* at 1429. Judge Letts stated that "the societal interest in protecting 16 and 17-year old 'children' begins to be strained," because "[a]t age 18 society will allow these persons to vote and to volunteer for a wholly foreign war." *Id.* at 1430. Furthermore, he noted as individuals reach the ages of 16 and 17 it is "no longer clear that Congress is protecting them from engaging in acts with which they would otherwise have no experience." *Id.* at 1430 n.43.

For better or worse, many 16 and 17-year old girls are sexually active. Indeed, many of them marry by that age, as was apparently true of Traci Lords. Given the fact that the Traci Lords tapes are not obscene, and that they are fully protected by the First Amendment, there is no adequate justification for branding Rubin Gottesman a child pornographer for distributing those tapes in this case.

CONCLUSIONS OF LAW

The Court finds the defendants not guilty of violating Counts 9, 10, and 11 of the indictment because the Government failed to prove beyond a reasonable doubt that defendants knew that Traci Lords was underage when she made the films defendants transported or shipped in interstate commerce and the Government failed to prove beyond a reasonable doubt that Traci Lords was in fact underage when she made the films introduced into evidence.

The Court is aware, of course, that it should not decide constitutional questions when it is unnecessary to do so. Accordingly, the Court does no more than invite Congress to re-examine § 2252 in light of *U.S. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988) particularly footnote 6. The Court reads that opinion as suggesting that § 2252 may be unconstitutional on its face because the Act does not require a distributor of constitutionally protected film know that the person depicted in the charged material was under 18 years of age. *See Smith v. California*, 361 U.S. 147 (1959). Judge Kozinski wrote that his reading of *Smith* "suggest that the First Amendment does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech." 858 F.2d at 540. In footnote 6 he stated that it would "undoubtedly chill" the distribution of films if sellers were burdened with learning "the ages of actors with whom they have had no direct contact, *see Smith*, 361 U.S. at 153-54. . . ."

Even if § 2252 could be rewritten to save it, the indictment would still be fatally defective because it does not allege that defendant knew Traci Lords was under 18 years of age. *Russell v. United States*, 369 U.S. 749, 771 (1962); *Stirone v. United States*, 361 U.S. 212, 218 (1960); *United States v. Pazsint*, 703 F.2d 420, 423 (9th Cir. 1983) ("After an indictment has been returned, its charges may not be broadened through amendment – whether it be by physical alteration, jury instruction, or bill of particulars – except by the Grand Jury.")

_____

DAVID V. KENYON
Judge, United States District Court,
Central District of California

Dated: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CR-88-295-KN

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RUBIN GOTTESMAN, INDIVIDUALLY AND DOING BUSINESS AS
STEVEN ORENSTEIN, AND
X-CITEMENT VIDEO, INC., DEFENDANTS

(PROPOSED) FINDINGS OF FACT RE COUNTS 9, 10, 11

ERRATA SHEET

1. Finding 1 at page 2 lines 18-21 should read as follows:

> 1. Count 9 of the indictment alleges that defendants conspired to violate the Sexual Exploitation of Children Act, 18 U.S.C. § 2252, and Counts 10 and 11 allege a violation of said section.

2. Paragraph 5(1) page 3 lines 20-24 should read as follows:

> 5. The elements of the crime of violating § 2252 are as follows:
>
> > 1. That the defendant knowingly transported or shipped in interstate commerce visual depictions.

Dated: May 16, 1989

Respectfully submitted,
Fleishman, Fisher & Moest
Stanley Fleishman
By: /s/ Stanley Fleishman
STANLEY FLEISHMAN
Attorneys for Defendant

160

Supreme Court of the United States

No. 93-723

UNITED STATES, PETITIONER

v.

X-CITEMENT VIDEO, INC., ET AL.

ORDER ALLOWING CERTIORARI.
Filed February 28, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

February 28, 1994

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No. 93-723

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly held that 18 U.S.C. 2252, which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face on the ground that it does not require the government to prove that the defendant knew that the materials at issue depicted minors engaging in sexually explicit acts.

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14 Weekly Comp. Pres. Doc. 279 (Feb. 13, 1978) 34

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-723

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 982 F.2d 1285. The two opinions of the district court (Pet. App. 30a-36a, 37a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1992. A petition for rehearing was denied on July 9, 1993. Pet. App. 43a. On September 24, 1993, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 6, 1993. The petition was filed on November 5, 1993, and was granted on February 28, 1994. J.A. 382. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2252 (1988) provided as follows:[1]

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

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[1] In 1990, Section 2252(a) was amended by revising paragraph (2) in minor respects, and by adding new paragraphs (3) and (4), which prohibit the sale or possession of visual depictions or materials containing visual depictions, either where the conduct occurs in the special maritime or territorial jurisdiction of the United States or where the materials have been mailed or have been shipped or transported in interstate or foreign commerce. Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, Tit. III, § 323(a) and (b), 104 Stat. 4818-4819. Section 2252, as so amended, is reproduced at App., *infra*, 3a-5a.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined nor more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

The other statutory provisions pertinent to this case—18 U.S.C. 2251 and 2256—are reproduced at App., *infra*, 1a-2a, 5a-6a.

STATEMENT

After a bench trial in the United States District Court for the Central District of California, respondents were convicted on one count of shipping child pornography, in violation of 18 U.S.C. 2252(a)(1); one count of distributing child pornography, in violation of 18 U.S.C. 2252(a)(2); and one count of conspiring to violate 18 U.S.C. 2252, in violation of 18 U.S.C. 371.[2] Respondent Gottesman was sentenced to 12 months' imprisonment on one count, and the sentences on the remaining two counts were suspended in favor of three years' probation. Respondent X-Citement Video, Inc., was fined $250,000 on each count, all but $100,000 of which was suspended. Pet. App. 2a; Def't C.A. Excerpt of Record (E.R.) 74-77. The court of appeals reversed, with one judge dissenting in part. Pet. App. 1a-29a.

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[2] The district court acquitted respondents on one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and six counts of using a common carrier to ship obscene material in interstate commerce, in violation of 18 U.S.C. 1462.

1. The evidence at trial showed that in June 1986, Los Angeles Police Officer Steven Takeshita and FBI Special Agent Nellie Magdaloyo, posing as pornography distributors, met with Gottesman at the business premises of X-Citement Video, which Gottesman owned. At the meeting, Gottesman agreed to ship videotapes showing adults engaging in sexually explicit conduct to the store in Hawaii that Takeshita supposedly owned and that Magdaloyo was said to manage. The next month, Takeshita returned to X-Citement Video and spoke with Gottesman, who mentioned that he was keeping some tapes at his residence because of the Traci Lords investigation. Newspaper articles appearing at that time reported that Lords had appeared in pornographic films while she was under age 18. Gov't C.A. Excerpts of Record (E.R.) 18-21, 27-28; J.A. 139-143.

Approximately six months later, Takeshita returned to X-Citement Video to purchase additional videotapes. During that visit, Gottesman offered to sell Takeshita the Traci Lords tapes. Gottesman instructed an employee, Steve Orenstein, to show Takeshita the tapes, but Orenstein declined, saying that he knew the tapes were illegal and that he did not want to get arrested. Gottesman then took Takeshita upstairs and showed him 49 tapes featuring Lords. Takeshita asked which films had been produced when Lords was 15, and Orenstein (who by that time had joined Gottesman and Takeshita) identified two of the tapes as being among Lords' earliest films. Gov't E.R. 34-40.

In discussing the purchase of the tapes, Gottesman said that he would accept only cash because he did not want to create any record of the transactions. He also declined to ship the tapes to Hawaii, noting that he was under federal investigation. Gottesman said that if

Takeshita were arrested, Gottesman would not acknowledge where the tapes had come from. Gov't E.R. 41-43.

When Takeshita arrived at X-Citement Video the next day to pick up the tapes, Gottesman recommended that Takeshita sell the tapes for $50 each. He warned Takeshita that any customer willing to pay more than $50 was probably a police officer. Gottesman stated that the government did not prosecute sales of child pornography in Hawaii and that it was therefore safe to sell the tapes in that State. Gottesman supplied Takeshita with 50 videotapes featuring Lords before her 18th birthday. That transaction formed the basis for the charge that respondents had distributed child pornography in violation of 18 U.S.C. 2252(a)(2). Gov't E.R. 48-52; J.A. 93.

When Takeshita returned to X-Citement Video on February 13, 1987, Gottesman informed him that 56 additional Traci Lords tapes were available for a total price of $1,000. Gottesman initially refused Takeshita's request that he ship the tapes to Hawaii, explaining that because Lords was a minor, the interstate shipment of the films would be unlawful. Approximately two months later, however, Gottesman agreed to ship the tapes to Hawaii. That transaction formed the basis for the charge that respondents had shipped child pornography in violation of 18 U.S.C. 2252(a)(1). Gov't E.R. 54-56; J.A. 94.

2. Following a bench trial, the district court found respondents guilty of violating 18 U.S.C. 2252(a). That provision states that any person who "(1) knowingly transports or ships * * * any visual depiction" or "(2) knowingly receives, or distributes, any visual depiction" shall be guilty of a felony, if "(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct." The district court concluded that "the

statute does imply a scienter requirement; and that the Government was required to prove and did prove scienter by showing that [respondents] knew that the person depicted in the videotapes was under 18 years of age." Pet. App. 41a ¶2. In the court's view, "[i]t is axiomatic that to know the nature and character of child pornography, almost by definition, one must know that it depicts children." *Id.* at 41a ¶3. The court further found as fact that respondents "knew that Traci Lords was under age when she made the films [respondents] transported or shipped in interstate commerce." *Id.* at 39a ¶7.

While respondents' appeal was pending, the Ninth Circuit rendered its decision in *United States* v. *Thomas*, 893 F.2d 1066, cert. denied, 498 U.S. 826 (1990). The court in *Thomas* held that Section 2252 "does not require that [the defendant] knew that the pornography he transported, mailed, and received involved a minor. The section requires only that [the defendant] knowingly transported and received the material." 893 F.2d at 1070. The court in *Thomas* did not address the question whether Section 2252, as so construed, is constitutional. Respondents in the instant case requested and received a remand to the district court for reconsideration in light of *Thomas*. Pet. App. 2a-3a.

On remand, respondents argued that Section 2252, as construed in *Thomas*, violates the First Amendment and the Due Process Clause. In light of *Thomas*, the district court modified its prior conclusions of law, deleting its earlier conclusion that Section 2252 "implies a scienter requirement" and that the government "was required to prove and did prove scienter by showing that [respondents] knew that the person depicted in the videotapes was under 18 years of age." Pet. App. 35a; see *id.* at 41a ¶2. The court rejected respondents' constitutional claims, however, holding that Section 2252, as construed

in *Thomas*, "does not impermissibly chill the distribution of constitutionally protected material" and is "sufficiently specific and definite to give fair notice to potential offenders so as not to be deemed void for vagueness." Pet. App. 36a. The court explained that in its view "[t]he government met its burden under the statute when it proved that [respondent Gottesman] had knowledge of the 'character and contents' of the material and that Mr. Gottesman was not a mere delivery person with no idea whether the package contained books or widgets." *Id.* at 35a. The court did not retract its earlier factual finding that respondents "knew that Traci Lords was under age when she made the films [respondents] transported or shipped in interstate commerce." *Id.* at 39a ¶7.

3. The court of appeals reversed respondents' convictions. Pet. App. 1a-29a. The panel concluded that "*Thomas* is the only precedent from this circuit on the question of whether section 2252 requires scienter of the minority of the performers," and deemed itself "bound by [*Thomas*'s] conclusion that section 2252 contains no such requirement." Pet. App. 11a. Relying on this Court's decisions in *Smith* v. *California*, 361 U.S. 147 (1959); *New York* v. *Ferber*, 458 U.S. 747 (1982); *Osborne* v. *Ohio*, 495 U.S. 103 (1990); and *Hamling* v. *United States*, 418 U.S. 87 (1974), the court held that "the constitutional minimum requirement of scienter for the Act's proscription of transportation or receiving child pornography is knowledge that at least one of the performers is under age 18." Pet. App. 14a. In light of *Thomas*, the court declined to engraft a scienter requirement onto the statute in order to avoid holding it unconstitutional. *Id.* at 16a. Because Section 2252, as construed in *Thomas*, does not "require knowledge of the minority of the performers as an element of the crime it defines," the court held that

the statute is "unconstitutional on its face." Pet. App. 15a, 17a. Accordingly, the court reversed respondents' convictions.[3]

Judge Kozinski dissented in part. Although Judge Kozinski agreed that the word "knowingly" in Section 2252 "does not apply to the age of the depicted children," Pet. App. 23a, he believed that the court's duty was to save the statute from invalidation by reading into it a scienter requirement. *Id.* at 27a. Judge Kozinski noted that "[s]tatutes often fail to specify mental states for each element of the criminal offense, and courts routinely read scienter into a statute even absent constitutional considerations." *Ibid.* He observed that under this Court's decision in *Osborne* v. *Ohio*, 495 U.S. at 115, a requirement of "recklessness" as to the minority of a model or performer is sufficient to satisfy constitutional concerns. Pet. App. 18a-19a, 23a, 27a n.8. Judge Kozinski found it "inconceivable that, given the choice between no statute at all and a statute that contains a requirement of recklessness, those involved in passing the child pornography statute would have chosen the former rather than the latter." *Id.* at 28a. Judge Kozinski would have reversed the convictions, however, because he believed that respondents had been tried on a strict-liability theory. *Id.* at 17a n.*.

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[3] Before holding Section 2252 unconstitutional on the ground that it lacks a scienter requirement, the court of appeals rejected respondents' arguments that the statute is unconstitutionally overbroad and vague because (a) "minor" is defined in 18 U.S.C. 2256(1) as a person under age 18; (b) Section 2256(2)(E) uses the word "lascivious" instead of "lewd"; and (c) Section 2256 does not define "bestiality" or "sadistic or masochistic abuse." Pet. App. 5a-8a.

SUMMARY OF ARGUMENT

I. A. This Court's precedents make clear that federal statutes should be construed so as to avoid constitutional difficulties unless such a construction is plainly contrary to congressional intent. The Ninth Circuit's decision therefore may be upheld only if Congress has unmistakably declined to impose a scienter requirement in prosecutions under 18 U.S.C. 2252. Congress has manifested no such intent. Rather, read in light of its legislative history and established tenets of statutory construction, Section 2252 is best understood to require proof that the defendant transported, shipped, distributed, or received material that he knew depicted minors engaging in sexually explicit acts.

B. With the exception of "regulatory" or "public welfare" offenses, criminal liability ordinarily requires knowledge of the facts that render one's conduct unlawful, and the absence of an express knowledge requirement in a particular statute does not imply that Congress intended to create a strict-liability offense. The question instead is whether Congress has given an *affirmative* indication of its intent to impose criminal liability on individuals who act without *mens rea*. The text of Section 2252 does not support this conclusion, and certain aspects of the statute—such as the severity of the penalties for violations, and the practical difficulties that would attend any effort by distributors or receivers to verify the ages of performers whose majority might be open to question—weigh against it.

C. Nor does the legislative history suggest that Congress intended to dispense with a scienter requirement. Analysis of that history is complicated by the fact that Section 2252, as first enacted in 1978, proscribed the distribution and receipt only of *obscene* materials.

Section 2252 thus operated as a sentencing enhancement provision, increasing the penalties for violations of existing laws when those violations involved the use of minors engaging in sexually explicit conduct; and this version of the statute might plausibly be read not to require knowledge of a performer's minority. There is, however, no suggestion in the legislative history of congressional intent to dispense with a knowledge requirement under the current statute, which makes the minority of the performer the fact that separates lawful from unlawful conduct. In fact, when such a provision was first proposed in 1977, its sponsor stated unambiguously that it would impose liability only upon persons who knew that the materials in question depicted minors engaging in sexually explicit conduct.

D. Two *amici* contend that Section 2252 requires knowledge of the contents of proscribed materials but not of the minority of the performers. We disagree. *Amici*'s view finds no support in the text of the statute: There is no grammatically plausible way in which the word "knowingly" can be thought to refer to "sexually explicit conduct" but not to the "use of a minor." Their reading is also inconsistent with the legislative history and with the "background assumption of our criminal law," *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), that imposition of criminal liability ordinarily requires knowledge of the fact that separates lawful from unlawful conduct. The statute, so construed, would also raise significant First Amendment concerns.

II. In the instant case respondents were not (as the dissenting judge in the court of appeals believed) tried and convicted on a strict-liability theory. Rather, the government proved, and the district court found, that respondents "knew that Traci Lords was under age when she made the films [respondents] transported or shipped

in interstate commerce." Pet. App. 39a ¶7. Respondents' convictions therefore should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING 18 U.S.C. 2252 UNCONSTITUTIONAL ON THE GROUND THAT IT DOES NOT REQUIRE THE GOVERNMENT TO PROVE THAT THE DEFENDANT KNEW THAT THE MATERIALS DEPICTED MINORS ENGAGING IN SEXUALLY EXPLICIT ACTS

The court of appeals held 18 U.S.C. 2252 unconstitutional on its face because, under circuit precedent, the statute does not require the government to prove that the defendant knew that the material he is charged with distributing depicted a mi[illegible] engaging in sexually explicit acts. This Court, however, has traditionally been "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils." *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 466 (1989). Accordingly, the federal courts are to "construe [a] statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). See also *Public Citizen*, 491 U.S. at 465-466 (collecting cases); *United States* v. *Locke*, 471 U.S. 84, 96 (1985).

In this case, a construction of Section 2252 that would avoid the constitutional problem the Ninth Circuit identified would not be "plainly contrary to the intent of Congress." Indeed, read in light of established tenets of statutory construction and its legislative history (which manifests a sensitivity to First Amendment concerns),

Section 2252 is best understood to require proof that the defendant transported, shipped, distributed, or received material that he knew depicted minors[4] engaging in sexually explicit acts. Every other court of appeals to have considered the question has construed Section 2252 in that manner.[5]

A. Federal Criminal Statutes Ordinarily Are Presumed To Require Scienter

This Court has frequently recognized that "[c]riminal liability is normally based upon the concurrence of two

[4] Throughout this brief we use phrases such as "knowledge of a performer's minority" or "knowledge that a performer is a minor" to mean "knowledge that a performer is under 18 years of age." A person who knew that a particular performer was 17 years old, but mistakenly believed that a person of that age was not a "minor" within the meaning of the statute, would possess the requisite knowledge. The defendant's knowledge that a performer is under 18 may be proved by circumstantial as well as direct evidence. See note 29, *infra*.

[5] The Ninth Circuit stands alone in holding that Section 2252 imposes no scienter requirement regarding the minority of the model or performer. Prior to the Ninth Circuit's decision in the instant case, at least four circuits had concluded or assumed that Section 2252 does require proof of scienter. See *United States* v. *Garot*, 801 F.2d 1241, 1247 (10th Cir. 1986); *United States* v. *Brown*, 862 F.2d 1033, 1036, 1038 n.6 (3d Cir. 1988); *United States* v. *Marchant*, 803 F.2d 174, 177 (5th Cir. 1986); *United States* v. *Duncan*, 896 F.2d 271, 278 (7th Cir. 1990). Moreover, three courts of appeals have since considered and expressly rejected the holding of the Ninth Circuit in the instant case. Those courts have held that Section 2252 imposes a scienter requirement and that the statute, so construed, is constitutional. See *United States* v. *Gendron*, No. 92-2003 (1st Cir. Feb. 28, 1994), slip op. 2-12; *United States* v. *Gifford*, No. 93-1645 (1st Cir. Feb. 24, 1994), slip op. 20-24; *United States* v. *Colavito*, No. 93-1552 (2d Cir. Jan. 24, 1994, amended and published Mar. 10, 1994), slip op. 2444-2447; *United States* v. *Cochran*, No. 93-1578 (3d Cir. Feb. 2, 1994).

factors, 'an evil-meaning mind [and] an evil-doing hand.'" *United States* v. *Bailey*, 444 U.S. 394, 402 (1980) (quoting *Morissette* v. *United States*, 342 U.S. 246, 251 (1952)). "[T]he failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law." *Liparota* v. *United States*, 471 U.S. 419, 426 (1985). In general, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1978). "This Court, in keeping with the common-law tradition and with the general injunction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' * * * has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide." *Id.* at 437 (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)).[6]

This interpretive principle is qualified, however, in several significant respects. First, the Court in *Morissette* distinguished the offense at issue there from "public welfare offenses" that "do not fit neatly into any * * * accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals * * *, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." 342 U.S. at 255. The Court explained

[6] This "background assumption of our criminal law," *Liparota*, 471 U.S. at 426, applies even where it is not contended that a statute would be unconstitutional if construed to establish a strict-liability offense. *Id.* at 424 n.6; see also Pet. App. 27a (Kozinski, J., dissenting) ("Statutes often fail to specify mental states for each element of the criminal offense, and courts routinely read scienter into a statute even absent constitutional considerations.").

that "such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Id.* at 260 (quoting *United States* v. *Dotterweich*, 320 U.S. 277, 281 (1943)).[7] Given this Court's holdings that the First Amendment protects sexually explicit but non-obscene materials if they do not depict minors as performers or models, Section 2252 does not, in our view, fall into this category of "regulatory" or "public welfare" offenses for which scienter is ordinarily not required. See *Smith* v. *California*, 361 U.S. 147, 152 (1959).

Second, the requisite showing of *mens rea* generally need not include proof that the defendant understood the legal status of his actions (*i.e.*, knew his conduct to be unlawful). "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991).[8] Thus, although it is "a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen," *Liparota*, 471 U.S. at 425 n.9, "[i]t is not a defense to a charge of receipt of stolen goods that one did not know

[7] This category of "regulatory" or "public welfare" offenses is discussed in our brief in *Staples* v. *United States*, No. 92-1441 (argued Nov. 30, 1993). We have furnished counsel for respondents with a copy of our brief in *Staples*.

[8] The Court in *Cheek* held, however, that "Congress has * * * softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. * * * This special treatment of criminal tax offenses is largely due to the complexity of the tax laws." 498 U.S. at 200.

that such receipt was illegal." *Ibid.* The same rule applies in prosecutions involving communicative materials that are asserted to be protected by the First Amendment. To require awareness of illegality, the Court has recognized, "would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law." *Hamling* v. *United States*, 418 U.S. 87, 123 (1974).[9] See also *Rosen* v. *United States*, 161 U.S. 29, 41-42 (1896).

Third, once a defendant has been shown to have acted with criminal intent, factual circumstances of which he was unaware may properly be taken into account in establishing his guilt of a particular offense within federal jurisdiction and in assessing the appropriate level of punishment. In *United States* v. *Feola*, 420 U.S. 671 (1975), for example, the Court construed 18 U.S.C. 111 (1970). That statute provided that "[w]hoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [designated federal official] while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than

[9] In the context of obscenity prosecutions, this Court has held that a bookseller may not, consistent with the Constitution, be held criminally liable for the sale of obscene materials if he lacks knowledge of their contents. *Smith* v. *California*, 361 U.S. at 153. The defendant need not, however, be aware that the materials he sells or distributes are obscene. *Hamling*, 418 U.S. at 119-124. Rather, "[i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Id.* at 123. The Court in *Hamling* held that 18 U.S.C. 1461, which subjects to criminal penalties "[w]hoever knowingly uses the mails for the mailing" of obscene materials, requires proof that the defendant knew the character of the materials mailed but does not require proof that the defendant understood their "legal status." 418 U.S. at 119-121; see pages 43-44, *infra*.

three years, or both." The Court held that the statute could properly be applied to defendants who had assaulted undercover federal agents posing as narcotics buyers. The Court explained:

> This interpretation poses no risk of unfairness to defendants. It is no snare for the unsuspecting. Although the perpetrator of a narcotics "rip-off," such as the one involved here, may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful. The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected. In a case of this kind the offender takes his victim as he finds him. The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.

420 U.S. at 685; accord *Liparota*, 471 U.S. at 431-432 & n.15; see also *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2605 (1991) ("two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm").[10]

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[10] In *United States* v. *Falu*, 776 F.2d 46 (2d Cir. 1985), the court of appeals reviewed the defendant's conviction under 21 U.S.C. 845a(a) (Supp. II 1984) (currently codified at 21 U.S.C. 860(a) (Supp. IV 1992)). That Section imposed increased criminal penalties for "[a]ny person who violates section 841(a)(1) of this title by distributing a controlled substance in or on, or within one thousand feet of, [school property]." Proof that the defendant knew of the school's proximity, the court held, was not necessary to establish a violation of Section 845a(a). The court explained:

> This construction of section 845a(a) does not criminalize otherwise innocent activity, since the statute incorporates section 841(a)(1), which already contains a *mens rea* requirement * * *. This distinguishes the schoolyard statute from the one involved in *Liparota*, where failure to impose a *mens rea* requirement would "criminalize a broad range of apparently innocent conduct." * * * Anyone who violates section 845a(a) knows that distribution of narcotics is illegal, although the violator may not know that the distribution occurred within 1,000 feet of a school. In this respect, the schoolyard statute resembles other federal criminal laws, which provide enhanced penalties or allow conviction for obviously antisocial conduct upon proof of a fact of which the defendant need not be aware. See, e.g., [*Feola, supra*].

776 F.2d at 50 (quoting *Liparota*, 471 U.S. at 426). Accord *United States* v. *Lewin*, 900 F.2d 145, 148 (8th Cir. 1990); *United States* v. *Holland*, 810 F.2d 1215, 1222-1224 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987). Cf. *United States* v. *Pruitt*, 763 F.2d 1256, 1261-1262 (11th Cir. 1985) (person may be convicted of "knowingly or intentionally" distributing controlled substance to a minor even if he is unaware that the person is a minor), cert. denied, 474 U.S. 1084 (1986).

B. The Text Of 18 U.S.C. 2252 Provides No Clear Indication That Congress Intended To Create A Strict-Liability Offense

In holding that 18 U.S.C. 2252 does not require knowledge that a minor is involved in sexually explicit conduct, the Ninth Circuit in *United States* v. *Thomas*, 893 F.2d 1066, cert. denied, 498 U.S. 826 (1990), reasoned as follows:

> In subsection 1, "knowingly" modifies only "transports or ships." In subsection 2, "knowingly" modifies only "receives." The section, therefore, does not require that [the defendant] knew that the

pornography he transported, mailed, and received involved a minor.

893 F.2d at 1070. That analysis is doubly flawed. First, as we discuss below (see pages 28, 36-37, *infra*), the legislative history affirmatively indicates that Congress intended the word "knowingly" in Section 2252 to refer to the minority of the performer as well as to the act of transporting, shipping, receiving, or distributing. Second, the Ninth Circuit's reasoning misperceives the nature of the inquiry in a case such as this. Even if the word "knowingly" did not appear in Section 2252 at all, it would not follow that Congress intended to create a strict-liability offense. See *United States* v. *United States Gypsum Co.*, 438 U.S. at 438 ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.").[11] Outside the context of a regulatory or public welfare offense, the question instead is whether Congress has given an affirmative indication of its intent to impose criminal liability on individuals who act without *mens rea*. The text of Section 2252 reflects no such design. Indeed, certain features of the statute point in the opposite direction.

1. In *United States* v. *United States Gypsum Co.*, *supra*, the Court noted that individuals convicted of Sherman Act violations faced possible prison sentences

[11] Accord *United States* v. *Gendron*, slip op. 6 ("when a criminal statute is totally silent about state of mind (as is commonly the case), courts nonetheless assume that Congress intended to require some kind of guilty knowledge with respect to major wrong-creating elements of major crimes"); *id.* at 7 ("had the word 'knowingly' not appeared at all in the child pornography statute, courts * * * would have insisted nonetheless that prosecutors prove a guilty state of mind in respect to the nature of the material").

of up to three years and fines of up to $100,000. The Court observed that "[t]he severity of these sanctions provides further support for our conclusion that the Sherman Act should not be construed as creating strict-liability crimes." 438 U.S. at 442 n.18. Violations of Section 2252 are punishable by up to *ten* years' imprisonment and are subject as well to fines and to criminal or civil forfeiture, with enhanced penalties for repeat offenders. 18 U.S.C. 2252(b), 2253, 2254. The severity of the applicable penalties counsels hesitation in construing this Section to impose liability without scienter.

2. "In most previous instances [where a criminal statute has been held to impose strict liability], Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota*, 471 U.S. at 433. It could hardly be contended, however, that the content of magazines or videotapes is generally "subject to stringent public regulation." To the contrary, such regulation is ordinarily proscribed by the First Amendment. Thus, so long as the materials at issue are not obscene, the minority of a single performer can be the difference between conduct that is proscribed by Section 2252 and conduct that is constitutionally protected.[12] It would

[12] Materials may be proscribed as obscene only if the work, taken as a whole, "appeals to the prurient interest" and "lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, 413 U.S. 15, 24 (1973). The applicability of Section 2252, by contrast, does not require that the work as a whole be sexually oriented or that it lack seriousness of purpose. Cf. *New York* v. *Ferber*, 458 U.S. 747, 764 (1982). The film *Schindler's List*, for example, would fall within the statutory prohibition if a 17-year-old actor or actress had been used in a particular sexually explicit

seem particularly appropriate to construe a statute to impose a scienter requirement with respect to such a legally dispositive fact. Compare *Liporata*, 471 U.S. at 426.

3. This interpretation of Section 2252 derives further support from the practical difficulties that would attend efforts by distributors or receivers to verify the ages of performers whose majority might be open to question. Unlike persons who produce the visual depictions covered by the statute, whose activities are covered by 18 U.S.C. 2251 and who may be subjected to criminal liability even if they lack knowledge that a model or performer is under 18,[13] distributors or receivers may lack practical means of reliably determining the ages of performers with whom they have no direct contact.[14] Indeed, under

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scene. See William Branigin, *Manila in Agony Over Schindler's Ecstasy*, Wash. Post, Mar. 8, 1994, at B1. The age of a single performer may thus differentiate prohibited child pornography from First Amendment protected materials.

[13] The legislative history makes clear Congress's intent that knowledge of a performer's minority is not required under Section 2251. See H.R. Rep. No. 696, 95th Cong., 1st Sess. 12 (1977) (hereinafter *1977 House Report*); S. Conf. Rep. No. 601, 95th Cong., 1st Sess. 5 (1977); H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977); pages 29, 33, *infra*; compare *Morissette*, 342 U.S. at 255, 260. In 18 U.S.C. 2257(b), Congress has imposed on the producer of materials containing depictions of sexually explicit conduct the duty to ascertain the birth date of each performer. No comparable duty is imposed on those who transport or distribute such materials.

[14] In *United States* v. *United States District Court for Central District of California*, 858 F.2d 534 (1988), the Ninth Circuit pointed out: "Those who arrange for minors to appear in sexually explicit materials are in a far different position from those who merely handle the visual images after they are fixed on paper, celluloid or magnetic tape. While it would undoubtedly chill the

the construction of Section 2252 propounded by the Ninth Circuit in *Thomas*, the statute would presumably impose criminal penalties upon employees of common carriers who unwittingly assist in the transport or shipment of proscribed materials, since such persons "knowingly" perform the act of transporting or shipping. See *United States* v. *Gendron*, No. 92-2003 (1st Cir. Feb. 28, 1994), slip op. 7. That broad sweep of Section 2252, if it does not include a scienter requirement concerning the contents of the materials, weighs heavily against such a construction. *Ibid.*

C. The Legislative History Of 18 U.S.C. 2252 Affirmatively Indicates That Congress Did Not Intend To Dispense With A *Mens Rea* Requirement

The legislative history reinforces the indications in the text of 18 U.S.C. 2252 that scienter with respect to the minority of the child is an element of the offense.

1. a. Sections 2251 and 2252 of Title 18 were first enacted as part of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7 (1978). That Act began its passage through Congress in the form of a number of bills employing different approaches to the problem. The principal formulation, in S. 1585, 95th Cong., 1st Sess. (1977), and H.R. 8059, 95th Cong., 1st Sess. (1977), was to add only Section 2251 to Title 18 in order to reach producers of child pornography. Other bills (including S. 1011, 95th Cong., 1st Sess. (1977), introduced by Senator Roth) proposed

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distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of actors with whom they have had no direct contact, producers are in a position to know or learn the ages of their employees." *Id.* at 543 n.6 (citation omitted).

adding a second provision, Section 2252, to Title 18 in order to reach distributors and recipients of child pornography.

On behalf of the Department of Justice, Assistant Attorney General Patricia M. Wald offered extensive comments regarding the provisions of S. 1011. See S. Rep. No. 438, 95th Cong., 1st Sess. 24-30 (1977) [hereinafter *1977 Senate Report*]. She noted that "the bill does not distinguish between material which is obscene and material which is protected by the First Amendment," and concluded that "[i]n the face of the strong constitutional protection accorded material which is not obscene, we cannot say with any certainty that the proposed legislation would withstand constitutional challenge." *Id.* at 27. She also recommended that

> the word "knowingly" in the second line of section 2251 is unnecessary and should be stricken. * * * Unless "knowingly" is deleted here, the bill might be subject to an interpretation requiring the Government to prove the defendant's knowledge of everything that follows "knowingly", including the age of the child. We assume that it is not the intention of the drafters to require the Government to prove that the defendant knew the child was under age sixteen but merely to prove that the child was, in fact, less than age sixteen.

Id. at 28-29.[15] She stated, however:

[15] Two witnesses who appeared before the Senate Judiciary Committee agreed that use of the word "knowingly" in Section 2251 would require proof that the defendant was aware that a performer or model was a minor. *Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 95, 106 (1977) [hereinafter *1977 Senate Hearings*].

> On the other hand, the use of the word "knowingly" in subsection 2252(a)(1) is appropriate to make it clear that the bill does not apply to common carriers or other innocent transporters who have no knowledge of the nature or character of the material they are transporting. To clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved.

Id. at 29. Finally, Assistant Attorney General Wald noted that "[t]o the extent that section 2252 deals with obscene material, the offenses are covered by existing Federal statutes. See 18 U.S.C. 1461-1465." *Id.* at 30.[16]

The views of the Department of Justice were developed further in testimony given by representatives of the Department during hearings in the Senate and House of Representatives. The Department's constitutional concerns extended to the production as well as the distribution of non-obscene materials portraying sexually explicit conduct on the part of minors. The Department took the position that the production of such materials was not constitutionally protected[17] and could

Unlike Assistant Attorney General Wald, however, those witnesses advocated retention of the knowledge requirement. *Ibid.* Senator Culver also appears to have understood the word "knowingly" in Section 2251 to require proof that the defendant knew that the child was a minor. See *id.* at 106.

[16] Deputy Assistant Attorney General Keeney submitted a similar analysis of legislative proposals pending before the House of Representatives. See *1977 House Report* 17-23.

[17] That proposition commanded general agreement among witnesses in the House and Senate hearings. A spokesperson for

be prosecuted by state authorities under existing child abuse statutes. *Sexual Exploitation of Children: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 312 (1977) [hereinafter *1977 House Hearings*]. The Department expressed doubt, however, regarding congressional power to proscribe such acts absent a nexus to interstate commerce. *Id.* at 314-315. And if the required nexus consisted of the subsequent distribution in interstate commerce of non-obscene materials, the Department feared, the legislation might be struck down as violative of the First Amendment. *Id.* at 315.[18] The Department therefore recommended that Congress

> amend the obscenity statutes to cover producers and manufacturers who manufacture this material with knowledge or reason to know that it will move in interstate commerce, and further amend the obscenity

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the American Civil Liberties Union, for example, stated (*1977 Senate Hearings* 97):

> [T]hose who directly cause and induce a minor to engage in a sexual act, or engage in it with a minor, are those who violate the laws; those who recruit and offer children for sexual acts clearly should be prosecuted. Indeed, the ACLU believes that even the activities of one who records the event of the sexual behavior, such as the photographer at the scene, can be found within the group of persons who have caused the act to occur. In contrast, those who have not participated in causing or engaging in the sexual activity but who may profit as a result of it, such as a publisher, editor, distributor or retailer, are not violating the law. While we may vigorously dislike and reject what they do, their activities in publishing and disseminating printed or visual materials are wholly protected by the First Amendment.

[18] The Department expressed the same concerns before a Senate subcommittee. See *1977 Senate Hearings* 86-87.

> statutes by providing a higher penalty when children are used in the sexual activities in the production of this material.

1977 Senate Hearings 85; see also *1977 House Hearings* 309.

b. The bill reported by the Senate Judiciary Committee incorporated some but not all of the Department's suggestions. Section 2252 was eliminated entirely from the bill. The Senate Report explained:

> The Committee has carefully considered the suggestion that the Federal laws be extended to make illegal the sale and distribution of materials whose production involved the use of minors in sexually explicit conduct as defined in Section 2251. The Committee recognizes, however, that the sale and distribution of such material cannot be approached in the same manner as its production. * * * [T]he Committee is of the view that an attempt to make illegal the sale and distribution of material regardless of whether such material when taken as a whole is obscene, would run counter to present Federal constitutional law as ennunciated [*sic*] by the Supreme Court in [*Miller* v. *California*, 413 U.S. 15 (1973)].

1977 Senate Report 17-18. Instead, the committee bill would have amended 18 U.S.C. 1461 ("Mailing obscene or crime-inciting matter"), 1462 ("Importation or transportation of obscene matters"), and 1465 ("Transportation of obscene matters for sale or distribution") to provide enhanced penalties if the proscribed materials "involved the use of any person under the age of 16 years engaging in sexually explicit conduct (as defined in

section 2251 of this Title)." *1977 Senate Report* 23, 24 (emphasis omitted).[19]

By contrast, Section 2251, as reported by the Senate Judiciary Committee, was not limited to the production of obscene materials. See *1977 Senate Report* 2 (text of bill).[20] The word "knowingly" was retained in Section 2251. The Senate Report stated that "[i]t is the Committee's intention that the use of the word 'knowingly' in both Sections 2251(a) and (b) will require that the person charged under these provisions have knowledge or reason to know the purpose for which the minor was being used in the production of the material in question." *1977 Senate Report* 15-16. The Report did not further elaborate upon the knowledge issue or specifically state whether knowledge of the performer's minority was to be an element of the offense.

c. The Senate Judiciary Committee's decision to eliminate Section 2252 sparked substantial controversy on the Senate floor. Senator Roth, while praising the committee bill as a whole, expressed the view that "the bill

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[19] Under the committee bill such violations would have been punishable by "a fine of not more than $10,000, or imprisonment of not less than one year nor more than ten years, or both, for the first offense, or a fine of not more than $15,000, or imprisonment of not less than two years nor more than fifteen years, or both, for each such offense thereafter." *1977 Senate Report* 23, 24 (emphasis omitted).

[20] The 1977 Senate Report (at 16) did, however, contain the following enigmatic statement: "Section 2251 may literally encompass isolated, individual acts involving the use of children in the production of sexually explicit materials. Section 2251 is not intended to reach all such isolated incidents, which often are more appropriately the subject of state or local concern. The Committee fully intends that federal prosecutors will wisely exercise their discretion to reach only those cases which are the proper subject of Federal concern."

has one serious shortcoming in that it fails to include a strong provision against the distributors and sellers of child pornography." 123 Cong. Rec. 33,047 (1977). He continued (*ibid.*):

> The bill does contain increased penalties for the distribution of child pornography that is deemed obscene under present obscenity statutes. In other words, in this crucial area of distribution, the bill does not offer a new law, but rather merely increases the penalties under existing law. Unfortunately, though, existing statutes have proven remarkably ineffective in eliminating child pornography.

Senator Roth accordingly introduced an amendment to the committee bill to provide (*ibid.*):

> (a) No person may—
>
> (1) knowingly transport, ship, or mail in interstate or foreign commerce for the purpose of sale or distribution for sale any film, photograph, negative, slide, book, magazine, or other print or visual medium depicting a minor engaged in sexually explicit conduct; or
>
> (2) knowingly receive for the purpose of sale or distribution for sale, or knowingly sell or distribute for sale, any film, photograph, negative, slide, book, magazine, or other print or visual medium depicting a minor engaged in sexually explicit conduct which has been transported, shipped, or mailed in interstate or foreign commerce.

Responding to the contention that a ban on the transportation or distribution of non-obscene materials would violate the First Amendment, Senator Roth stated that "[w]hile a challenge in the courts would appear certain, I

believe that this amendment's constitutionality could and would be upheld." *Id.* at 33,048. He noted that this Court had previously "identified an independent, 'transcending' interest of the State in the welfare of its children." *Ibid.*

A floor colloquy between Senators Roth and Percy addressed the significance of the word "knowingly" in the Roth amendment. Senator Percy expressed his understanding that to act "knowingly," "the distributor or seller must have either, first, actual knowledge that the materials do contain child pornographic depictions or, second, circumstances must be such that he should have had such actual knowledge, and that mere inadvertance [*sic*] or negligence would not alone be enough to render his actions unlawful." 123 Cong. Rec. 33,050 (1977). Senator Roth replied (*ibid.*):

> That is absolutely correct. This amendment, limited as it is by the phrase "knowingly," insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography and thereby are actively contributing to the maintenance of this form of child abuse are subject to prosecution under this amendment.

Senator Percy then asked whether a bookseller could be prosecuted under Section 2252 "if a book or magazine which happened to contain prohibited material is discovered in his shop." *Ibid.* Senator Roth responded that his amendment would "create[] no affirmative duty to inspect on the part of the distributor or seller, though it would certainly apply to one who actively and affirmatively endeavors to conceal his knowledge." *Ibid.*

The Roth amendment passed the Senate by a vote of 73-13. 123 Cong. Rec. 33,057 (1977). The bill as a whole then passed by a vote of 85-1. *Id.* at 33,060-33,061.

d. In the fall of 1977, the House of Representatives debated two distinct legislative proposals addressing the use of juveniles in sexually explicit photographs and films. The House first considered H.R. 6693, 95th Cong., 1st Sess. (1977), the Child Abuse Prevention and Treatment Amendments of 1977. Section 9 of that bill contained language very similar to the Roth amendment. See 123 Cong. Rec. 30,926, 30,927 (1977). Explaining the inclusion of the word "knowingly" in Section 9(a)(2) and (3) of the bill (which dealt with transportation, receipt, and sale of the proscribed materials), Representative Jeffords stated that "[w]e are talking about people knowing that it is the kind of stuff we are talking about, not knowing they are just transportating [*sic*] a piece of material. It is intended that they have knowledge of the type of material being transported, that it contains the type of material proscribed by this bill." 123 Cong. Rec. 30,935 (1977). He emphasized, in a point of particular relevance to the Ninth Circuit's constitutional concerns, that "[t]he legislative history should be clear on that so as to remove any chance it will lead into constitutional problems." *Ibid.* The bill passed the House by a vote of 375-12. *Id.* at 30,948-30,949.

Sixteen days later, the House Judiciary Committee reported H.R. 8059. That bill differed in significant respects both from H.R. 6693 and from the bill passed by the Senate. In H.R. 8059, the word "knowingly" was dropped from Section 2251. The committee report explained that the deletion had been made "at the suggestion of the Department of Justice. * * * It is not the intention of the committee to require the Government to prove the defendant knew the child was under age 16." H.R. Rep. No. 696, 95th Cong., 1st Sess. 12 (1977) [hereinafter *1977 House Report*]. The committee bill did not contain any version of Section

2252; nor did it contain any provision enhancing the penalties for shipment, transportation, or receipt of obscene materials depicting minors engaged in sexually explicit conduct. See *1977 House Report* 14-16 (text of bill). The House Report explained the committee's view that "there is no First Amendment question in providing for prosecution of persons who abuse children. However, once those photos and films are reduced to magazines, movies, etc., numerous court decisions including Supreme Court decisions, make clear that they are permissible under the First Amendment guarantee of free speech *unless* they are proven to be obscene." *Id.* at 7. The Committee also pointed out that many sellers and distributors of child pornography could be prosecuted under existing statutes, noting that "[w]e have viewed much of this material, and there seems little doubt that they [*sic*] would be found obscene under existing federal and state obscenity laws." *Ibid.*

The absence of a provision dealing with distribution offenses provoked considerable debate on the House floor. The committee bill was brought up under a motion to suspend the rules and thus was not subject to amendments. See 123 Cong. Rec. 34,992 (1977) (Rep. Conyers); *id.* at 34,997 (Rep. Rudd). The committee bill passed by a vote of 420-0. *Id.* at 35,024-35,025. After passage of the committee bill, however, Representative Ashbrook introduced a motion to direct the House conferees to agree to the Roth amendment. *Id.* at 35,030.[21] That motion passed by a vote of 358-54. *Id.* at 35,033-35,034.

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[21] In introducing his motion, Representative Ashbrook stressed the similarity between the Roth Amendment and Section 9 of H.R. 6693. 123 Cong. Rec. 35,030 (1977). Speaking in support of the motion, Representative Jeffords noted in the same vein that "[a]ll we are being asked to do here is to instruct the conferees to do something we have already done before by almost an overwhelming vote." *Id.* at 35,032.

e. Despite the broad support for the Roth amendment in both the Senate and the House of Representatives, the version of Section 2252 that emerged from the Conference Committee differed from Senator Roth's formulation. Section 2252(a) provided as follows:

> (a) Any person who—
>
> (1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if—
>
> (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual or print medium depicts such conduct; or
>
> (2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce, if—
>
> (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual or print medium depicts such conduct;
>
> shall be punished as provided in subsection (b) of this section.

S. Conf. Rep. No. 601, 95th Cong., 1st Sess. 2 (1977) (emphasis omitted) [hereinafter *Senate Conference Report*]; H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. 2 (1977) (emphasis omitted) [hereinafter *House Conference Report*]. The most significant change from the Roth amendment was the addition of the requirement that the "visual or print medium" be "obscene."[22] In *form*, the bill reported by the Conference Committee adopted Senator Roth's proposal by adding a new Section 2252 to Title 18 and creating a new offense. In substance, however, the Conference Committee's version of Section 2252 (like the bill previously reported by the Senate Judiciary Committee) operated as a sentencing enhancement provision: it increased the penalties for conduct that was already unlawful when that conduct involved the use of children in sexually explicit poses, but (due to the obscenity requirement) it did not prohibit any activity that was not already a violation of federal law.

In other respects as well, the version of Section 2252 reported by the Conference Committee departed from the language of the Roth amendment. The Conference Committee bill included the requirement that "the producing of such visual or print medium involve[] the use of a minor engaging in sexually explicit conduct," in addition to the requirement (incorporated from the Roth Amendment) that "such visual or print medium depict[] such conduct." Moreover, those two requirements were broken off into separate subclauses (A) and (B) introduced by the word "if," with the result that the word

[22] Representative Conyers subsequently explained that "[a] majority of the House conferees voted to accept the Roth amendment with the qualifying language that the printed or visual medium be obscene. The Senate receded and a compromise was struck." 124 Cong. Rec. 526 (1978).

"minor" might seem to be at greater remove from the word "knowingly." The Conference Report did not suggest, however, that those revisions were intended to have a bearing on the scienter issue.[23]

By contrast, the Conference Report explained that Section 2251 was revised for the specific purpose of eliminating a scienter requirement with respect to the age of the child:

> The Senate bill contains an express requirement in proposed section 2251(a) that the crime be committed "knowingly." The House amendment does not. The conference substitute accepts the House provision with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.

Senate Conference Report 5; *House Conference Report* 5. The Conference Committee's simultaneous retention of the word "knowingly" in Section 2252 indicates that it is an element of a prosecution under that provision that the defendant knew that the subject was a minor.

The bill reported by the Conference Committee was passed by the Senate on November 4, 1977, 123 Cong.

[23] The Conference Report is of little assistance in determining the intended reach of the word "knowingly" in Section 2252. The Report stated only that "[i]t is the intent of the conference committee that if a minor has engaged in this sexually explicit conduct and there was a production of material using any printed or visual medium depicting such conduct that persons who knowingly transport, ship, or mail for the purpose of sale or distribution, or knowingly thereafter receive for sale or distribution, or knowingly thereafter sell or distribute for sale any such material are liable whether or not they have contact with the minor or the original production of the material." *Senate Conference Report* 7; *House Conference Report* 7.

Rec. 37,136 (1977), and by the House on January 24, 1978, 124 Cong. Rec. 531 (1978).[24] It was signed into law by President Carter on February 6, 1978. 14 Weekly Comp. Pres. Doc. 279, 304 (Feb. 13, 1978). In light of the passage of that law, the provisions of H.R. 6693 dealing with child pornography were dropped from H.R. 6693 as ultimately enacted. See Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266, 92 Stat. 205; 124 Cong. Rec. 9306 (1978) (Rep. Jeffords).

2. On July 2, 1982, this Court rendered its decision in *New York* v. *Ferber*, 458 U.S. 747. The Court in *Ferber* held that the First Amendment does not prevent a State from prohibiting the dissemination of non-obscene materials whose production involves the participation of children under age sixteen in sexually explicit conduct. Under the rule announced by the Court, "[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be

[24] The Conference Committee's decision to add an obscenity requirement to Section 2252 provoked little debate during consideration of the Conference Report. Senator Roth acknowledged "mixed feelings regarding the conference report," 123 Cong. Rec. 37,135 (1977), but characterized the bill as "a major step in the right direction." *Id.* at 37,136. Representative Ashbrook expressed personal opposition to the obscenity requirement but stated that "in all fairness, we have about 90 percent of the Roth amendment." 124 Cong. Rec. 528 (1978). In a similar spirit, Representative Kildee stated that "[a]lthough I opposed the inclusion of the word 'obscene,' the majority of the conferees felt that it was necessary to meet any possible first amendment questions. The inclusion of the word 'obscene' did not alter the purpose of the legislation. All of the conferees agreed that the reason for this legislation was to protect children from a particularly vicious form of abuse." *Id.* at 529.

considered as a whole." 458 U.S. at 764. The Court noted, however, that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *Id.* at 765.

In response to this Court's decision in *Ferber*, Congress in 1984 amended Section 2252 to eliminate the requirement that the proscribed materials be obscene. See Child Protection Act of 1984, Pub. L. No. 98-292, § 4(3), 98 Stat. 204.[25] Both the House and Senate reports noted that inclusion of the obscenity requirement in the original 1978 legislation had reflected Congress's perception that in the absence of such a requirement Section 2252 would have been of doubtful constitutionality. See H.R. Rep. No. 536, 98th Cong., 1st Sess. 1-2 (1983); S. Rep. No. 169, 98th Cong., 1st Sess. 7 (1983). "Because the Supreme Court ha[d] * * * settled the obscenity question, [the 1984 amendments] remove[d] the obscenity requirement from the distribution offense to maximize the protection Federal law can offer to the Nation's children." *Ibid.*[26] The legislative history of the 1984 amendments does not address the question whether a prosecution under Section 2252 requires proof that the

[25] The statute was amended in other respects as well. The 1984 amendments, *inter alia*, deleted the element of a commercial purpose under Section 2252; increased the potential fines under Sections 2251 and 2252; and raised the age at which models or performers would cease to be treated as minors under the statute from 16 to 18. See 98 Stat. 204-205.

[26] See also 129 Cong. Rec. 32,458 (1983) (Rep. Hughes); *id.* at 32,459 (Rep. Pashayan); *ibid.* (Rep. Sawyer); *id.* at 32,461 (Rep. Sensenbrenner); 130 Cong. Rec. 7197 (1984) (Sen. Specter); *id.* at 7198 (Sen. Grassley).

defendant was aware of the minority of a particular performer.[27]

3. The text and history of Section 2252, as enacted in 1978, are perhaps susceptible of two quite different interpretations regarding the scienter issue presented here. On the one hand, the presence of the word "knowingly" in Section 2252, as well as the other textual indicia noted above (see pages 18-21, *supra*), suggest that Congress intended to require knowledge of a performer's minority as an element of the offense. That reading is supported by Senator Roth's unequivocal statement that such knowledge would be required under the Roth amendment, and by Representative Jeffords' similar statement that a House provision patterned after the Roth Amendment was intended to reach persons who have knowledge that a shipment "contains the type of material proscribed by this bill." 123 Cong. Rec. 30,935

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[27] Section 2251 was amended in 1986 in minor respects not relevant here. Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, §§ 2-3, 100 Stat. 3510. The House Report on the 1986 Amendments states that "[t]he government must prove that the defendant knew the character of the visual depictions as depicting a minor engaging in sexually explicit conduct but need not prove that the defendant actually knew the person depicted was in fact under 18 years of age or that the depictions violated Federal law." H.R. Rep. No. 910, 99th Cong., 2d Sess. 6 (1986). That statement, however, addresses amendments to Section 2251, and we do not believe that it sheds light on the proper construction of Section 2252.

In 1988, Section 2252 was further amended to prohibit transportation or shipment by computer. See Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. N, § 7511(b), 102 Stat. 4485. Section 2252 was further amended in 1990. See note 1, *supra*. Neither the text nor the legislative history of those amendments addresses the scienter issue in this case.

(1977). Despite the addition of an obscenity requirement, Members of both Houses characterized the version of Section 2252 reported by the Conference Committee as substantially similar to the Roth amendment. That interpretation of Section 2252 derives further support from the fact that the Conference Committee deleted the word "knowingly" from Section 2251 for the specific purpose of making clear that knowledge of a performer's minority is *not* an element of the offense of producing prohibited depictions.

On the other hand, it could be argued that Section 2252, as enacted in 1978, did not require knowledge of a performer's minority. Due to the addition of the obscenity requirement, the enactment of Section 2252 did not prohibit any conduct that was not already criminal; it simply had the effect of increasing the punishment for transportation and distribution of obscene materials the production of which involved the use of minors engaging in sexually explicit conduct. Imposition of enhanced penalties based on a fact of which the defendant was unaware would not be contrary to the presumption, outside the context of so-called "regulatory" or "public welfare" offenses, that criminal liability requires *mens rea*. See pages 15-16, *supra*. Moreover, the effect of the Conference Committee's revision of the Roth amendment to include the two requirements set off in subclauses (A) and (B) was to place the word "knowingly" in relatively close proximity to the word "obscene" but at somewhat greater remove from the word "minor." Section 2252, as originally enacted, might therefore have been read to incorporate the approach suggested by the Justice Department in 1977: a limitation of the distribution offense to obscene materials, with a requirement (mandated by *Hamling*) that the distributor have knowledge of the materials' (obscene) "nature and

character," but with no requirement that the distributor know that the performer was a minor. See *1977 Senate Report* 27, 29 (letter of Assistant Attorney General Wald); *1977 House Report* 20, 22 (statement of Deputy Assistant Attorney General Keeney). In contrast to the interpretation we urge, however, this interpretation is not supported by any affirmative statements in the legislative history.

For present purposes, however, the crucial point is this: under *either* view of Congress's intent in 1977-1978, there is *no* indication that Congress intended for Section 2252 to impose criminal liability in the complete absence of *mens rea* with respect to the nature of the materials. The 1984 amendments to Section 2252, by deleting the requirement that the proscribed materials be obscene, fundamentally altered the significance of a performer's minority. The minority of a particular performer no longer serves merely to increase the penalties for conduct that is independently unlawful. Rather, the minority of the performer now separates conduct that is legal—indeed, protected by the First Amendment—from conduct that is criminal. Speculation from mere silence that Congress in 1978 might plausibly have wished not to require knowledge of a fact that served only to enhance penalties surely provides no clear, affirmative indication that Section 2252 should be construed not to require proof of such knowledge now that the same fact furnishes the *basis* for criminal liability.

The conclusion that the intent to enact such a provision should not be attributed to Congress is buttressed by the 1977 colloquy between Senators Percy and Roth regarding the proper construction of the Roth amendment at a time when it did not include an obscenity requirement. Senator Roth was at that time the foremost congressional proponent of the view that Congress could

and should criminalize the distribution of non-obscene materials whose production involved the use of minors engaging in sexually explicit conduct. Senator Roth made clear, however, that his amendment would impose criminal liability only upon "those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography." 123 Cong. Rec. 33,050 (1977). This interpretation also is supported by the repeated expressions of concern in the legislative history leading up to enactment of Section 2252 in 1978 that measures to combat child pornography be fashioned in a manner that would render them constitutional. See pages 22-30, *supra*.

D. 18 U.S.C. 2252 Should Be Construed To Require Knowledge That The Production Of Particular Materials Involved The Use Of A Minor Engaging In Sexually Explicit Conduct

For the reasons stated above, we believe that 18 U.S.C. 2252 incorporates a scienter requirement and that the Ninth Circuit erred in construing it as a strict-liability provision. Two *amici*, while acknowledging that Section 2252 requires some form of scienter—and therefore does not apply to persons who are unfamiliar with the contents of proscribed materials—argue that proof of knowledge of a performer's minority is not essential. See National Family Legal Foundation *et al.* Amicus Br. Pet. Stage 11-12 ("standard would be met when * * * the defendant had knowledge * * * that [material] was sexually explicit and that the 'actors' and 'actresses' appeared youthful"); National Law Center for Children and Families *et al.* Amicus Br. Pet. Stage 5 ("Section 2252 should be interpreted to require scienter as to the sexually explicit nature of the materials distributed" but not

to "requir[e] scienter as to minority").[28] We disagree. In our view, to obtain a conviction under Section 2252, the government is required to prove that the defendant transported, shipped, distributed, received, sold, or possessed material that he knew depicted minors engaging in sexually explicit acts.[29]

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[28] The district court appears to have applied a similar standard when it reconsidered respondents' conviction on remand from the Ninth Circuit. In light of *Thomas*, the district court held that knowledge of a performer's minority was not required. It stated, however, that "[t]he government met its burden under the statute when it proved that [respondent Gottesman] had knowledge of the 'character and contents' of the material and that Mr. Gottesman was not a mere delivery person with no idea whether the package contained books or widgets." Pet. App. 35a.

[29] We wish, however, to make two points regarding the proper implementation of this knowledge requirement. First, the requirement that a defendant act "knowingly" entails no special limitations on the manner by which such knowledge may be established. Like other elements of a criminal offense, a defendant's state of mind may be proved by circumstantial as well as by direct evidence. See, *e.g.*, *United States* v. *Ocampo-Guarin*, 968 F.2d 1406, 1410 (1st Cir. 1992); *Mallette* v. *Scully*, 752 F.2d 26, 32 (2d Cir. 1984); *United States* v. *Beck*, 615 F.2d 441, 449 (7th Cir. 1980); *United States* v. *Hudson*, 717 F.2d 1211, 1213 (8th Cir. 1983). For example, the youthfulness of a particular performer will often be so apparent from the visual depictions themselves as to permit a judge or jury to conclude, on that basis alone, that any individual who viewed the materials must have possessed the requisite knowledge. Cf. *United States* v. *United States Gypsum Co.*, 438 U.S. at 446 (noting that "an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted"); *Cheek*, 498 U.S. at 203-204 (unreasonableness of defendant's purported opinions may cause the jury to conclude that they are not sincerely held). A judge or jury might also infer the requisite knowledge from other types of circumstantial evidence, such as the titles of proscribed materials and/or the manner in which they were packaged or advertised,

1. Section 2252 makes criminal the conduct of any person who "knowingly [transports, ships, receives, distributes, sells, or possesses] any visual depiction, if * * * (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct." The word "knowingly" might plausibly be taken to apply to both the "use of a minor" and the presence of "sexually explicit conduct"; it might also plausibly be taken to apply to neither. But it would be grammatically strained to read it to modify only the latter. The construction advo-

---

even if the defendant has not been shown to have viewed the depictions themselves. A Section 2252 defendant need not be shown to have had direct contact with the minor in question, nor must the defendant's knowledge of the performer's minority be manifested by express assertions of such awareness. Cf. *Smith* v. *California*, 361 U.S. at 154.

Second, "in common understanding one 'knows' facts of which he is less than absolutely certain. To act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question." *United States* v. *Jewell*, 532 F.2d 697, 700 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976). Accord *United States* v. *United States Gypsum Co.*, 438 U.S. at 445; American Law Institute, *Model Penal Code & Commentaries* § 2.02(7), at 227 (1985) (when "knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist"). A corollary to that rule is the well-established principle that a defendant acts "knowingly" when he "willfully blinds" himself to facts showing that he is dealing with proscribed materials. See, *e.g.*, *United States* v. *Picciandra*, 788 F.2d 39, 46-47 (1st Cir.), cert. denied, 479 U.S. 847 (1986); *United States* v. *Graham*, 739 F.2d 351, 352-353 (8th Cir. 1984) (per curiam); *United States* v. *Burns*, 683 F.2d 1056, 1059-1061 (7th Cir. 1982) (per curiam), cert. denied, 459 U.S. 1173 (1983); *United States* v. *Jewell*, 532 F.2d at 700-703.

cated by *amici* is thus a most unlikely interpretation of the statutory text enacted by Congress. Nor is the position espoused by *amici* supported by other indicia of congressional intent.

2. The position of *amici* also is inconsistent with "background assumption[s] of our criminal law." *Liparota* v. *United States*, 471 U.S. at 426. In construing federal criminal statutes outside the context of regulatory or public welfare offenses, this Court has typically presumed that imposition of criminal liability requires knowledge of the fact that separates lawful from unlawful conduct. See, *e.g.*, *United States* v. *Bailey*, 444 U.S. at 408; *United States* v. *United States Gypsum Co.*, 438 U.S. at 444-445.[30] Distribution or receipt of non-obscene materials that include visual depictions of "sexually explicit conduct" as defined in 18 U.S.C. 2256(2) is not in itself unlawful. Rather, the minority of the performer

[30] In *United States* v. *Feola*, *supra*, for example, the Court held that in a prosecution under 18 U.S.C. 111 (1970) the government generally need not prove that the defendant was aware of his victim's status as a federal agent. The Court stated, however, that such knowledge would be relevant in "circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of *mens rea*. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent." 420 U.S. at 686. Thus, knowledge that the victim was a federal agent may be relevant in some Section 111 prosecutions but not in others, depending on whether the victim's federal status is a fact that separates lawful from unlawful conduct.

involved is the fact that renders the act illegal.[31] Absent substantial evidence of contrary congressional intent, established canons of statutory construction support an interpretation of Section 2252 under which the defendant must have known that the performer who engaged in such conduct was a minor.

This Court's decision in *Hamling* v. *United States*, *supra*, does not suggest a different result. The Court there held that under both the First Amendment and 18 U.S.C. 1461 it is "sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." 418 U.S. at 123. The Court explained that the government was not required to "prove a defendant's knowledge of the legal status of the materials he distributes." *Id.* at 121. In an obscenity prosecution, a defendant who knows the contents of the materials in question knows all the facts that are relevant to the verdict of the judge or jury; extrinsic evidence regarding the circumstances under which visual depictions were produced simply does not bear on the question whether they are obscene. *Hamling* is thus consistent with the general rule governing criminal prosecutions: the government must prove that the defendant knew the facts that rendered his conduct

[31] Nor does the youthful appearance of the performers render the distribution or receipt of such materials unlawful. The Court in *Ferber* noted that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." 458 U.S. at 763. Of course, a judge or juror may infer from the appearance of the performer, alone or in combination with other evidence, that the performer was in fact under 18 years of age at the time the materials were produced. The legally dispositive fact, however, is the actual rather than the apparent age of the performer.

illegal, but it need not establish the defendant's awareness of the applicable law. See *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 563-565 (1971). Materials proscribed by Section 2252 are characterized not simply by their depiction of sexually explicit conduct, but by the minority of the performer depicted therein. As the district court stated in its initial opinion in this case, "to know the nature and character of child pornography, almost by definition, one must know that it depicts children." Pet. App. 41a.[32]

3. Finally, Section 2252 as construed by *amici* would raise serious First Amendment concerns. As a practical matter, distributors and receivers of films or magazines often may not be able to verify with assurance the age of a particular performer. See pages 20-21 & note 14, *supra*. Yet such persons would be subject to the possibility of severe criminal penalties based solely on their awareness that the materials in question depict sexually explicit conduct—depictions that may be constitutionally protected if no performer is a minor. This Court should be reluctant "to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence

[32] Contrary to the contention of *amici* National Family Legal Foundation *et al.* (see Br. Pet. Stage 13-14), our construction of the statute preserves the distinction between knowledge of facts and knowledge of the law. A Section 2252 defendant who knows that a film depicts a 17-year-old performer engaging in simulated sexual intercourse may be prosecuted for distributing it, even if he is unaware that the federal statute exists, erroneously believes that the age of 16 years remains the statutory cutoff, or does not know that simulated as well as actual sexual conduct is covered by the Act.

that it courted those perils." *Public Citzen* v. *United States Department of Justice*, 491 U.S. at 466.[33]

II. RESPONDENTS' CONVICTIONS SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT FOUND THAT THEY HAD KNOWLEDGE THAT THE PERSON DEPICTED IN THE FILMS WAS A MINOR

Properly construed to require knowledge that materials depict a minor engaging in sexually explicit conduct, 18 U.S.C. 2252 is clearly constitutional. Because respondents were tried and convicted based upon that construction of the statute, their convictions should have been affirmed. In particular, Judge Kozinski was simply incorrect in his assertion that respondents were "tried under a theory which imposed strict liability as to the age of the minor." Pet. App. 17a n.*. To the contrary, the district court initially held that "the Government was required to prove and did prove scienter by showing that [respondents] knew that the person depicted in the videotapes was under 18 years of age," *id.* at 41a ¶2, and found as fact that respondents "knew that Traci Lords was under age when she made the films [respondents] transported or shipped in interstate commerce." *Id.* at

[33] The principle that statutes should if possible be construed so as to avoid unnecessary constitutional difficulties would not, we acknowledge, prevent the Court from fashioning a middle ground. Section 2252 might (for example) be construed to require knowledge of the sexually explicit character of the materials and "recklessness" as to the minority of the performer. See *Osborne* v. *Ohio*, 495 U.S. 103, 113 n.9, 115 (1990); Pet. App. 27a-28a & n.8 (Kozinski, J., dissenting). *Osborne* strongly indicates that such a statute would be constitutional. We nevertheless believe, based on the presence of the word "knowingly" in the statute and the legislative history referring to knowledge, that Section 2252 is best read to require knowledge of a performer's minority.

39a ¶7. See also J.A. 111-113, 138. Although the district court on remand amended its original conclusions of law in light of the Ninth Circuit's decision in *Thomas*, see Pet. App. 36a, it did not retract its earlier finding of fact, which was amply supported by the record.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
JO ANN HARRIS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney

APRIL 1994

APPENDIX

Statutory Provisions

18 U.S.C.:

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or

publishes, or causes to be made, printed or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported in interstate or foreign commerce by any means including by computer or mailed.

(d) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of

this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using [materials] which have been mailed or so shipped or transported, by any means, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates paragraph (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined under this title and imprisoned for not less than five years nor more than fifteen years.

(2) Whoever violates paragraph (4) of subsection (a) shall be fined under this title or imprisoned for not more than five years, or both.

* * * * *

§ 2256. Definition for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape;

(6) "computer" has the meaning given that term in section 1030 of this title; and

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.

(15)

Supreme Court, U.S.
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No. 93-723

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

X-CITEMENT VIDEO, INC.;
and RUBIN GOTTESMAN,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF

[redacted]

STANLEY FLEISHMAN
Counsel of Record
BARRY A. FISHER
DAVID GROSZ
FLEISHMAN FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. section 2252 – which punishes as a felony the distribution and receipt of all expressive material visually depicting a minor engaging in sexually explicit conduct – violates the First and Fifth Amendments because:

a. Congress deliberately and unambiguously omitted knowledge of minority as an element of the crime.

b. The expansive definition of "sexually explicit conduct" – which includes the "actual or simulated lascivious exhibition of the genitals or pubic area of any person" – is vague and reaches a substantial amount of constitutionally protected expressive matter.

c. Defining a minor as a person under age 18, sweeps more broadly than is warranted by the evil at which the statute aims.

2. Whether 18 U.S.C. section 2252, as applied to respondents, violates the First and Fifth Amendments because the indictment does not allege that respondents knew that the person depicted was under 18 years of age.

3. Whether 18 U.S.C. section 2252, as applied to the respondents, violates the First Amendment because the videotapes are adult entertainment not "kiddie porn."

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U.S. Const. amend. V 1, 12, 24

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment provides in relevant part:

> Congress shall make no law . . . abridging the freedoms of speech, or of the press.

2. The Fifth Amendment provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

3. Article 1, section 1 of the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

4. Article 1, section 7, cl. 2, provides in relevant part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approves he shall sign it . . . .

5. 18 U.S.C. § 2251 provides in relevant part:

> (c) (1) Any person who . . . knowingly makes . . . any notice or advertisement seeking or offering –
>
> (A) to receive . . . distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct, and such visual depiction is of such conduct . . . . shall be punished . . . .

6. 18 U.S.C. § 2252 provides in relevant part:

(a) Any person who –

(1) knowingly transports . . . in interstate . . . commerce . . . any visual depiction, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported . . . in interstate . . . commerce . . . if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct . . . shall be punished . . . .

7. The full text of 18 U.S.C. §§ 2251, 2252, and 2256 is set forth in the brief for the United States.

STATEMENT

A. On April 6, 1988, a federal grand jury filed a 12-count indictment against respondents. (JA 68-98.) Counts 1 to 8 charged respondents of one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1986(c); one count of conspiring to commit that offense in violation of 18 U.S.C. § 1962(d); and six counts of using a common carrier to ship obscene material in interstate commerce in violation of 18 U.S.C.

§ 1462. (JA 68-88.) Counts 9, 10 and 11 contained one count of shipping child pornography in violation of 18 U.S.C. § 2252(a)(1); one count of distributing child pornography in violation of 18 U.S.C. § 2252(a)(2); and one count of conspiring to violate 18 U.S.C. § 2252, in violation of 18 U.S.C. § 371.[1]

Respondents moved to dismiss counts 9, 10 and 11 alleging, inter alia, that section 2252 is unconstitutional on its face because it does not contain a scienter-as-to-minority requirement, and that the indictment was fatally defective because it did not allege that respondents knew that the person depicted was under 18 years of age. (JA 144-147.) The court denied the motion to dismiss, concluding that section 2252 is constitutional; that the statute does imply a scienter requirement; and that the Government was required to prove scienter by showing that defendants knew that the person depicted in the videotapes was under 18 years of age. (*See* Pet. 40a-41a.)

B. The evidence at a bench trial showed that, in 1986 and 1987, an undercover police officer, posing as a retailer of adult videotapes, contacted Gottesman, the operator of X-Citement Video, Inc., a wholesaler, and expressed interest in buying videotapes featuring Traci Lords. Gottesman eventually sold two sets of such tapes; the first was a box of 49 tapes that he sold directly to the police officer; the second was a box of eight tapes that

[1] Count 12 alleged a violation of 18 U.S.C. §§ 992(g) and 924. It was separated from the rest of the case, and Gottesman was found not guilty of it. (JA 28-29.) Respondents were acquitted on counts 1-8 when the court found that the tapes were not obscene. (JA 114-118.)

Gottesman sold to the police officer and sent (in accordance with the police officer's instruction) to Hawaii. (Pet. 2a.)

The Government introduced newspaper articles dated July 18, and July 24, 1986, reporting that Traci Lords had appeared in sexually explicit films while she was under age 18. (JA 139-143.) Ms. Lord's first professional appearance was as a model in the September 1984 issue of *Penthouse* magazine, when she was 16 years of age. (JA 140.) She was considered one of the top adult film actresses in the country and made about 75 sexually explicit movies and videos while she was 16 and 17 years of age. (JA 140.)

On seeking employment as a performer, Ms. Lords provided a California driver's license, a U.S. passport, and a birth certificate, which stated that her name was Kristie Nussbaum and gave a birth date of November 17, 1962. (JA 142.) She showed the same identification to *Penthouse* before it published her pictures in its September 1984 issue. (JA 143.)

Gottesman testified that he knew of the rumors that Ms. Lords was under 18 years of age when she made the tapes, but that he believed she was in fact over 18 years. (JA 128.) He knew her personally, and over a three-year period he met with her between 40 and 50 times. (JA 120.) On one occasion, she borrowed $3,000 from him, stating that she had an opportunity to go to London for a modeling job. (JA 122.) Ms. Lords told Gottesman that she was married to Tom Byron, who was in virtually all of the movies she made. (JA 134.)

Gottesman believed that Ms. Lords falsely floated the rumor that she was under 18 when she made the tapes to drive the tapes from the market so that the new film she was in the process of making would be more valuable. In fact, she made about a million dollars from an adult movie she appeared in shortly after the newspaper articles appeared. (JA 128-129.)

C. At the close of the Government's case, (JA 99-113), and at the close of all the evidence, (JA 134-136), respondents moved for a judgment of acquittal on the grounds that section 2252 is unconstitutional on its face because it does not require scienter as to minority; that the indictment is constitutionally defective because it does not allege that respondents knew Traci Lords was under 18 years of age; and that the Traci Lords tapes were not "child pornography." Respondents submitted proposed findings of fact and conclusions of law, (JA 149-157), asserting, inter alia:

> Even if section 2252 could be rewritten to save it the indictment would still be fatally defective because it does not allege that defendants knew Traci Lords was under 18 years of age. *Russell v. United States*, 369 U.S. 749, 771 (1962). *Stirone v. United States*, 361 U.S. 212, 218 (1960). . . .

(JA 157.)

The court rejected respondents' arguments and entered findings of fact and conclusions of law, finding respondents guilty on the counts involving section 2252. (Pet. 37a-42a.) It concluded that section 2252 *implies* a scienter as to minority requirement because "to know the nature and character of child pornography almost by definition one must know that it depicts children." (Pet.

41a.) The court also concluded that the Government "was required to prove and did prove scienter by showing that [respondents] knew that the person depicted . . . was under 18 years of age." (Pet. 41a.) Subsequently, on remand, the court withdrew this conclusion and concluded that the Government met its burden when it proved that respondent Gottesman "had knowledge of the 'character and contents' of the material and that Mr. Gottesman was not a mere delivery person with no idea of whether the package contained books or widgets." (Pet. 35a.)

D. After respondents filed a notice of appeal, the Ninth Circuit decided *United States v. Thomas*, 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990). *Thomas* held that the word "knowingly" used in section 2252 modifies only transports, ships, or receives and that it does not require that the defendant know that the material he transported, mailed or received involved a minor. "The section," *Thomas* stated, "requires only that Thomas knowingly transported and received the material." *Id.* at 1070.

Respondents then requested and obtained a remand to the district court for reconsideration in light of *Thomas*. (Pet. 30a.) On remand, the court concluded that "Congress specifically omitted a *mens rea* requirement for conviction under the statute in order to establish a *per se* rule making it illegal for persons to knowingly transport, ship, receive or distribute . . . the prohibited material involving sexual exploitation of minors." (Pet. 34a.) The court added that the Government met its burden "when it proved that defendant had knowledge of the 'character and contents' of the material." (Pet. 35a.)

E. The court of appeals reversed respondents' convictions. It held that section 2252 is unconstitutional on its face because it does not require scienter as to minority. (Pet. 5a.) In light of its ruling on the unconstitutionality of the Act, it did not address respondents' argument that the indictment was fatally defective, (Pet. 4a n.3), nor did it reach respondents' argument that the tapes were not "child pornography," and that the Act was therefore unconstitutionally applied. (Pet. 5a). Finally, the court rejected respondents' submission that the statute is unconstitutionally vague and overbroad because, inter alia, it defines sexually explicit conduct too broadly. (Pet. 5a-8a.)

In the court of appeals, the Government argued that section 2252 requires knowledge of "the nature and character of the material." This position, the court responded, "is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but . . . . seems to be saying . . . that the statute does not even require that the defendant know that one or more performers was under the age of 18. . . . " (Pet. 9a-10a, 13a.) The Government's final position in the court of appeals was that "the scienter required was analogous to that required for obscenity convictions – general knowledge of the nature of the contents of the materials, not knowledge of the . . . age of the minor." (Pet. 13a.)

The Ninth Circuit rejected this analogy. It recognized that in *Hamling v. United States*, 418 U.S. 87 (1974), the Court held that it was not necessary to know the *legal* status of the material. But, the court stated, "[t]he question before us does not concern the defendant's requisite knowledge of the law; it concerns his knowledge of a

particular fact – the underage of the performer." (Pet. 14a.)

In concluding that the minimum constitutional requirement of scienter for the Act's proscription is knowledge that at least one of the performers is under 18, the court stated that the section "potentially applies to all kinds of recipients or distributors of videotapes and magazines," and "[t]o render them all prima facie criminals if one of the performers in a portrayal of sexually explicit conduct is under age, without the distributor's or recipient's knowledge, would be to create precisely the kind of chilling effect condemned by *Smith* [*v. California*, 361 U.S. 147 (1959)]." (Pet. 15a.) Finally, the court concluded that it could not construe section 2252 so as to save its constitutionality because to do so comes too close to "judicial rewriting of a statute." (Pet. 16a.)

Judge Kozinski dissented in part. He agreed that the word "knowingly" in section 2252 does not apply to the age of the person depicted, (Pet. 23a), and that the statute "must contain a *mens rea* requirement." (Pet. 17a.) He believed, however, that it was the court's duty to read the scienter requirement into the statute to render it constitutional, (Pet. 27a), even if "its drafters plainly had not meant to put it there." (Pet. 24a n.6).

SUMMARY OF ARGUMENT

1. a. The Ninth Circuit held, and the parties agree, that section 2252 would violate the First Amendment if it did not contain a scienter as to minority requirement. Accordingly, the central question is whether the word

"knowingly" in section 2252 applies to the minority of the person depicted.

Every canon of statutory construction supports the conclusion that the Court should start from the text of the statute. Plainly read, the word "knowingly" in section 2252 does not require knowledge of the minority of the performer. The adverb "knowingly" in section 2252(a)(1)(A) modifies the verbs "transports" and "ships," the interstate nexus requirement, and the phrase "visual depiction." The phrase "minor engaging in sexual conduct" occurs in an independent clause set off by indentations in an outline form. The independent clause, as written, is syntactically and visually distinct from the remainder of section 2252(a)(1)(A).[2] The Government acknowledges that this construction "may be correct grammatically," (Pet. 8), and until this case it consistently so read section 2252. *See, e.g., United States v. Kleiner*, 663 F. Supp. 43 (S.D. Fla. 1987); *United States v. Tolczeki*, 614 F. Supp. 1424 (N.D. Ohio 1985).

The text and structure of section 2252 are true to the legislative history: the reports of both Houses of Congress affirmatively and clearly reflect Congress' intent "not to include scienter as to minority as an element of the crime." *United States v. United States District Court*, 858 F.2d 534, 538 (9th Cir. 1988).

Since the text and legislative history of section 2252 plainly exclude scienter as to minority as an element of the crime, the Court is not free "to add a constraint to the

[2] Section 2252(a)(2) is the same except that it refers to a person who "receives" or "distributes."

statute that its drafters plainly had not meant to put there," as Judge Kozinski suggested, (Pet. 24a n.6), because the legislature, not the Court, is entrusted with the responsibility of defining the elements of federal crimes, which are solely creatures of statute. *Liparota v. United States*, 471 U.S. 419, 424 (1985). Where, as here, Congress has failed to "act within . . . applicable constitutional constraints in defining criminal offenses," *id.* at 424 n.6, the Court must declare the statute unconstitutional, notwithstanding its laudable objectives.

There is another compelling reason for declaring section 2252 unconstitutional. The Government concedes that Congress unquestionably and intentionally omitted knowledge of minority from section 2251, the section punishing those who produce and advertise child pornography, and it implicitly acknowledges that section 2251 is therefore unconstitutional: this creates the absurd result of having a federal statute punishing those who distribute and receive child pornography, but not those who produce and advertise it.

b. Section 2256's definition of "sexually explicit conduct of a minor" is broader than the definition of "sexual conduct" in the New York statute upheld in *New York v. Ferber*, 458 U.S. 747 (1982). The New York statute defined a minor as a person under 16 years of age, while section 2256(1) defines a minor as a person under 18 years of age. When Congress raised the statutory age to 18, it made "encroachment on protected expression broader than that considered in *Ferber*," and unlike the potential overbreadth described in *Ferber*, "the potential number of instances of [reaching constitutionally protected material] is not a 'tiny fraction' and the proper dividing line among

cases involving the definition of 'sexual conduct' is not so clear." *United States v. Kantor*, 677 F. Supp. 1421, 1431-32 (C.D. Cal. 1987).

Moreover, section 2256(2) is not limited to the kind of "hardcore" depictions defined in the New York law which *Ferber* found suitably limited and described. Section 2256(2)(E), for example, defines sexually explicit conduct as the "actual or *simulated lascivious exhibition* of the genitals or *pubic area* of any person" (emphasis added).

American Library Association v. Thornburgh, 713 F. Supp. 469 (D.D.C. 1989), *vacated as moot sub nom., American Library Association v. Barr*, 956 F.2d 1178 (D.C. Cir. 1972), found this definition overly broad and vague when it invalidated the record-keeping provisions of the Act (section 2257). Congress then amended section 2257 to exclude "lascivious exhibition of the genitals or pubic area." *Barr*, 956 F.2d at 1186 n.5. Senator Thurmond explained that this was done to comply with the district court's ruling in *Thornburgh*. *Barr*, 956 F.2d at 1186. It thus appears that Congress agrees that section 2256(2)(E) sweeps more broadly than is warranted by the evil at which it is aimed. *See Boos v. Barry*, 485 U.S. 312, 329 (1988) ("The claim that the [statute] is sufficiently narrowly tailored is gravely weakened; if ever it did so, Congress no longer considers this statute necessary . . . . Relying on congressional judgment in this delicate area we conclude that the . . . [statute] is not crafted with sufficient precision to withstand First Amendment scrutiny.").

2. The indictment does not charge respondents with distributing or receiving visual depictions knowing that

the person depicted was under age 18. Accordingly, the indictment would have to be dismissed, even if such knowledge is read into section 2252, as the Government urges.

3. Traci Lords was a married woman over 16 years of age when she made the videotapes respondents allegedly distributed and received. She held herself out as an adult, and the videotapes were marketed as adult entertainment, not "kiddie porn": the boxes containing the videotapes stated that all performers were over 18 years of age. The Government never alleged that the videotapes were obscene, and they are protected by the First Amendment if, as respondents claim, they are not child pornography.

ARGUMENT

I.

ON ITS FACE, AND AS APPLIED, 18 U.S.C. SECTION 2252 VIOLATES THE FIRST AND FIFTH AMENDMENTS BECAUSE IT DOES NOT CONTAIN A SCIENTER AS TO MINORITY REQUIREMENT.

The Ninth Circuit held, and the parties agree, that without a scienter-as-to-minority requirement, section 2252 would be unconstitutional. (*See* Br. for Gov't 39-40.) The central issue, therefore, is whether the word "knowingly" in section 2252, does or does not apply to the minority of the person depicted.

A. Section 2252 Does Not Require Knowledge Of Minority Status.

Plainly read, section 2252 does not require knowledge of minority status. It reads:

> (a) Any person who –
>
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if –
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct; or
>
> (2) knowingly receives or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if –
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.[3]

The Ninth Circuit, relying on *United States v. Thomas*, 893 F.2d 1066, 1070 (9th Cir.), *cert. denied*, 498 U.S. 826 (1980), held that the word "knowingly" in section 2252 does not require that the defendant know that the expressive material transported or received involved a minor. (Pet. 10a.)

Judge Kozinski, dissenting in part, agreed that as a matter of simple statutory construction, section 2252 "does not apply to the age of the depicted children." (Pet. 23a.) *Thomas'* holding to this effect, he stated, "is not much more than we would learn by reading the statute

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[3] The Roth amendment, which Congress rejected, provided:

(a) No person may –

(1) knowingly transport, ship, or mail in interstate or foreign commerce for the purpose of sale or distribution for sale any film, photograph, negative, slide, book, magazine, or other print or visual medium depicting a minor engaged in sexually explicit conduct; or

(2) knowingly receive for the purpose of sale or distribution for sale, or knowingly sell or distribute for sale, any film, photograph, negative, slide, book, magazine, or other print or visual medium depicting a minor engaged in sexually explicit conduct which has been transported, shipped, or mailed in interstate or foreign commerce.

(Br. for Gov't 27.)

Much of the language of the Roth amendment found its way into § 2252, but with major structural changes – changes reflecting an acceptance of the Justice Department's recommendation that knowledge of minority be excluded as an element of the crime.

ourselves." (Pet. 23a-24a.) Judge Kozinski also agreed that section 2252 would violate the First Amendment if it omitted all knowledge of minority from the section. (Pet. 17a.)[4]

Grammatically and structurally, section 2252 is similar to 18 U.S.C. § 1001, the statute involved in *United States v. Yermian*, 468 U.S. 63 (1984). *Yermian* held that the words "knowingly and willfully" used in section 1001 did not modify the entire remainder of the clause in which they appeared. Rather, the Court stated, the words applied only to making "false or fraudulent statements or representations," and not to the phrase "in any matter within the jurisdiction of [a federal agency]." If Congress had intended the words "knowingly and willfully" to apply to the jurisdictional requirement, the Court stated, it would have inserted the phrase "knowing such statements to be in any matter within the jurisdiction of any federal agency." *Id.* at 73.

The same may be said for section 2252. Grammatically, the adverb "knowingly" used in section 2252(a)(1) modifies the verbs "transports" and "ships," the interstate nexus requirement, and the phrase "visual depiction." The phrase "minor engaging in sexual conduct" occurs in an independent clause set off by indentations

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[4] Judge Kozinski believed that a "recklessness" test would suffice, (Pet. 17a), but recognized that "[w]hich mental state to choose is not entirely clear," (Pet. 27a, n.8). Indeed, he was "not at all clear that a lesser state of mind such as negligence, would not suffice to save the statute." (Pet. 27a.) It is, of course, for Congress, not the Court, to decide "[w]hich mental state to choose."

and in outline form. The independent clause, as written, is syntactically and visually distinct from the remainder of section 2252.[5] If Congress had intended the word "knowingly" to apply to the minority of the person depicted, it would have drafted section 2252(a)(1)(A) to read:

> Any person who –
>
> (1) knowingly transports . . . any visual depiction, if –
>
> (A) *knowing that* the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct. . . .

The Government acknowledges that the Ninth Circuit's understanding of section 2252 "may be correct grammatically." (Pet. 8; Br. for Gov't 37-38.) Indeed, prior to this case, the Government consistently *did* read section

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[5] Because the use of the term "knowingly" is often troublesome, a rule of construction has developed to assist courts.

> [I]f commas set off certain words from the rest of the definition [placement of the *mens rea* element at the beginning of the sentence does not extend to the entire sentence]. For example suppose that a statute prohibits "intentional seizure of another [person] with intent to cause him, *without authorization of law* to be confined." The word "intent" probably should not be read to modify the italicized language because those words were set off from the rest of the statute. *See People v. Weiss*, 267 N.Y. 387, 12 N.E. 2d 514 (1983).

Joshua Dressler, *Understanding Criminal Law* section 10.05 n.3 (1987).

2252 as not requiring proof of knowledge of minority.[6] In *United States v. Kleiner*, 663 F. Supp. 43 (S.D. Fla. 1987), the court stated that it agreed "with the Government that the knowledge requirement under . . . section 2252 is not, as the defendants argue, whether the tape . . . was made using minors. . . . " *Id.* at 44.

In *United States v. Moncini*, 882 F.2d 401 (9th Cir. 1989), a case the Government relied heavily upon in the court of appeals, (Pet. 10a-11a), the court stated that at most the word "knowingly" in section 2252 can be construed to modify transports, ships or mails in conjunction with "any visual depiction [as defined by the statute]." Accordingly, the court said, "the Government must prove that the defendant had knowledge of the contents of the visual depictions and knowledge that they were to be mailed, but there is simply no reference to illegality in section 2252 which the word 'knowingly' could similarly be construed to modify." *Id.* at 405.

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[6] Even before the Act was amended in 1984, section 2252 was construed as not including a knowledge-of-minority requirement. Thus, in *United States v. Langford*, 688 F.2d 1088 (7th Cir. 1982), *cert. denied*, 461 U.S. 959 (1983), the jury was informed that it should convict if it found:

> 1. That on or about the date charged, the defendant knowingly mailed an item for the purpose of sale and distribution for sale.
> 2. That the item mailed was visual or print medium depicting sexually explicit conduct – [as defined under 18 U.S.C. section 2253(2)].
> 3. That the production of such a visual or print medium involved the use of a minor under the age of 16 engaging in sexually explicit conduct.
> 4. That the visual or print medium was obscene.

Id. at 1089 n.1.

In *Jacobson v. United States*, 112 S. Ct. 1535, 1545 (1992), Justice O'Connor, with whom the Chief Justice, Justice Kennedy, and Justice Scalia joined, dissenting, cited *Moncini* with approval stating that section 2252 "requires only knowing receipt of visual depictions produced by using minors engaged in sexually explicit conduct . . . . " *See also* Brief for the United States, pp. 18-19, *Knox v. United States*, 114 S. Ct. 375 (1993) ("The courts have held that the *mens rea* requirement in the statute is satisfied if a defendant is shown to know the nature and contents of the materials.").[7]

This understanding is in accord with the legislative history which reflects "that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved." S. Rep. No. 438, 95th Cong., 1st Sess. 23-24 (1977) [hereinafter 1977 Senate Report].

The House and Senate Reports affirmatively and unambiguously reveal that Congress purposely omitted knowledge of the performer's minority as an element of the crime. *See District Court*, 858 F.2d at 538. A "report obviously does not have the force of law," but "when the text of a bill is not changed after it leaves the committee,

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[7] The Government now recognizes that this standard is constitutionally flawed. Accordingly, it disagrees, with two amici who "argue that proof of knowledge of a performer's minority is not essential." (Br. for Gov't 39.) The Constitution would not be satisfied if § 2252 were "interpreted to require scienter as to the sexually explicit nature of the materials distributed but not to requir[e] scienter as to minority." (Br. for Gov't 39-40 (inner quotations omitted).)

the Members are entitled to assume that the report fairly summarizes the proposed legislation." *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1597 n.7 (1994) (Stevens, J., joined by O'Connor, J., dissenting).

Assistant Attorney General Patricia M. Wald, representing the Department of Justice, wrote a long analysis of the bill that ultimately became law to the Chairman of the Committee on the Judiciary, which letter was appended to the 1977 Senate Report. Discussing section 2251, she stated that, unless the word "knowingly" was deleted "the bill might be subject to an interpretation requiring the Government to prove the defendant's knowledge of everything that follows 'knowingly,' including the age of the child." The word "knowingly," she therefore suggested, should be deleted because it was "not the intention of the drafters to require the Government to prove that the defendant knew the child was under age 16 but merely to prove that the child was, in fact, less than age 16." In this respect, she stated, the bill would resemble that portion of the White Slave Traffic Act, which makes it an offense "knowingly to induce or coerce girls under the age of 18 to travel . . . for immoral purposes." Under that statute, "there is no requirement . . . that the Government prove the defendant knew the girl's age. *See United States v. Hamilton*, 456 F.2d 171 (3rd Cir. 1972)." 1977 Senate Report 23.

Addressing section 2252, Ms. Wald stated that the use of the word "knowingly" in that section was "appropriate to make it clear that the bill does not apply to common carriers or other innocent transporters who have no knowledge of the nature or character of the material they are transporting." To clarify the situation, she suggested

"the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense, but that the bill is not intended to apply to innocent transporters with no knowledge of the nature or character of the material involved." *Id.* at 23-24 (emphasis added). *See also* H.R. Rep. No. 696, 95th Cong., 1st Sess. 21-22 (1977) (statement of Deputy Assistant Attorney General John C. Keeney).

The conference committee accepted Ms. Wald's recommendation "with the intent that it is not a necessary element of a prosecution that the defendant know the actual age of the child." H.R. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977) [Conference Report]. The Conference Report states that "it is the intent of the conference committee that if a minor has engaged in this sexually explicit conduct and there was a production of material using any printed or visual medium depicting such conduct that persons who knowingly transport, ship, or mail for the purpose of sale or distribution, or knowingly thereafter receive for sale or distribution, or knowingly thereafter sell or distribute for sale any such material, are liable whether or not they have contact with the minor or the original production of the material." *Id.* at 3.

The Government acknowledges that the House and Senate Reports could support respondents' argument that section 2252, as enacted in 1978, "did not require knowledge of a performer's minority." (Br. for Gov't 37.) It observes that the Conference Committee's revision of the Roth amendment, *see supra* note 3, to include the two requirements set off in subclauses (A) and (B) was to place the word "knowingly" a distance from the word "minor," possibly "to incorporate the approach suggested

by [Ms. Wald] in 1977." (Br. for Gov't 37.) This approach would impose a requirement that the distributor have knowledge of the material's nature and character, "but with no requirement that the distributor know that the performer was a minor. *See 1977 Senate Report* 27, 29 (letter of Assistant Attorney General Wald); *1977 House Report* 20, 22 (statement of Deputy Assistant Attorney General Keeney).") (Br. for Gov't 38.)

The critical language used in sections 2251 and 2252 is identical. Section 2251(c)(1) provides in relevant part:

> Any person who . . . knowingly . . . publishes . . . any notice or advertisement seeking or offering –
>
> (A) to receive . . . distribute, or reproduce any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct . . . . shall be punished.

Section 2252(a)(2) provides in relevant part:

> Any person who – . . . .
>
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce . . . . if –
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct . . . . shall be punished . . . .

The Government acknowledges that "[t]he legislative history makes clear Congress' intent that knowledge of a performer's minority is not required under section 2251. See H.R. Rep. No. 696, 95th Cong., 1st Sess. 12 (1977); S. Conf. Rep. No. 601, 95th Cong., 1st Sess. 5; H.R. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977)." (Br. for Gov't 20 n.13.) At the same time, it argues that the identical language in section 2252 does require knowledge of a performer's minority. It is settled, however, that language used in several places in a statutory scheme "is generally read the same way each time it appears," *Ratzlaf v. United States*, 114 S. Ct. 655, 660 (1994), and this is especially so here since the legislative history makes plain that that was Congress' intent.

Nevertheless, the Government argues that two remarks made on the floor trump the House and Senate Reports. (Br. for Gov't 28-29.) This is not the law. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) ("committee reports are 'more authoritative' than comments from the floor"). Moreover, neither of the floor statements relied upon by the Government supports its claim that Congress intended section 2252 to contain a knowledge of minority requirement. The Government first points to a floor colloquy between Senators Roth and Percy discussing the Roth amendment – an amendment that Congress rejected. Senator Roth is quoted as saying that the word "knowingly," "insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography . . . are subject to prosecution under this amendment." (Br. for Gov't 28.) This is hardly a statement that a defendant would have to know that the person depicted was a minor. Indeed, the statement more

likely means that a defendant would have to know the contents of the material. This *mens rea* would be in accord with the legislative history. *See* 1977 Senate Report 23-24.

The other statement was made by Representative Jeffords, who explained that in using the word "knowingly," "[w]e are talking about people knowing that it is the kind of stuff we are talking about not knowing they are just transporting [sic] a piece of material. It is intended that they have knowledge of the type of material being transported, that it contains the type of material proscribed by the bill." (Br. for Gov't 29.) It is difficult to see how this statement supports the Government's claim that Congress intended the word "knowingly" to apply to the minority of the performer.

Finally, the Government argues that, even if Congress affirmatively and deliberately omitted knowledge of minority from section 2252 in 1977, the 1984 amendments had the effect of inserting that requirement into section 2252. (Br. for Gov't 38-39.) This argument is meritless.

First, the 1984 amendments were silent concerning the word "knowledge." Second, the changes made in 1984 all had the purpose of making it easier for the prosecutor to obtain a conviction. Thus, for example, the amendments deleted the language that required that the materials be transported for the purpose for "sale or distribution for sale" in order to broaden the scope of the statute, and no longer required that the visual depiction be obscene but merely that it involve the use of a minor engaged in sexually explicit conduct. The amendments also raised the age of minority from 16 to 18, substituted the word "lascivious" for "lewd" in section 2256(2)(E),

and substituted "sadistic or masochistic abuse" for "sado-masochistic abuse (for the purpose of sexual stimulation)" in section 2256(2)(D). Finally, section 2252 had been authoritatively construed as not requiring knowledge of minority, in *United States v. Langford*, 688 F.2d 1088 (7th Cir. 1982), *see supra* note 6, prior to the 1984 amendments. Congress presumably was aware of this construction, *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and could have corrected the judicial understanding of section 2252 if it disagreed.

In the context of the changes made, it is irrational to believe that Congress silently amended section 2252 to require proof of knowledge of minority. Nevertheless, the Government speculates that because "the minority of the performer now separates conduct that is legal – indeed, protected by the First Amendment – from conduct that is criminal," (Br. for Gov't 38), it follows that in 1984 Congress intended section 2252 to now have a scienter of minority requirement, (Br. for Gov't 39). But Congress' silence on this issue speaks louder than the Government's speculation.

B. Without Scienter Of Minority, Section 2252 Violates The First And Fifth Amendments.

Section 2252 is extremely broad. For example, a person sending or receiving an art book containing a single depiction of "actual or simulated lascivious exhibition of the genitals or pubic area of any person," or actual or simulated "sexual intercourse," "bestiality," "masturbation," or "sadistic or masochistic abuse" is guilty of the crime of child pornography, if the depiction happens to

be of a person under 18 years of age.[8] It is for this reason that the Ninth Circuit concluded that "the constitutional minimum requirement of scienter for the Act's proscription of transporting or receiving child pornography is knowledge that at least one of the performers is under 18 years of age." (Pet. 14a.) Citing *Smith v. California*, 361 U.S. 147 (1959), the court stated "it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of the actors with whom they have no direct contact." (Pet. 15a (quoting *District Court*, 858 F.2d at 543-44 n.6).)

The court observed that section 2252 "potentially applies to all kinds of recipients or distributors of videotapes and magazines," and that "[t]o render them all prima facie criminals if one of the performers in a portrayal of sexually explicit conduct is underage, without the distributor's or recipient's knowledge, would be to create precisely the kind of chilling effect condemned by *Smith*." (Pet. 15a.)

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[8] "Many of the world's great artists – Degas, Renoir, Donatello, to name but a few – have worked from models under 18 years of age, and many acclaimed photographs and films have included nude or partially clad minors." *Massachusetts v. Oakes*, 491 U.S. 576, 591 (1989) (Brennan, J., joined by Marshall & Stevens, JJ., dissenting). *See, e.g.*, Richard Marshall, *Robert Mapplethorpe* (Whitney Museum of American Art 1988); *Photographs of Jock Sturges: The Last Day of Summer* (Aperture 1991); Sally Mann, *Immediate Family* (Aperture 1992); Stephanie Barron, *Degenerate Art: The Fate of the Avant-Garde in Nazi Germany* (Los Angeles County Museum of Art 1991).

The Government agrees. It notes that regulating the content of nonobscene magazines or videotapes is ordinarily proscribed by the First Amendment, and that "so long as the materials at issue are not obscene, the minority of a single performer can be the difference between conduct that is proscribed by section 2252 and conduct that is constitutionally protected." (Br. for Gov't 19.) Since distribution or receipt of nonobscene materials that include visual depictions of "sexually explicit conduct" as defined in section 2256(2) is not in itself unlawful "the minority of the performer involved is the fact that renders the act illegal." (Br. for Gov't 42-43.)

Accordingly, the Government disagrees with amici who, "while acknowledging that section 2252 requires some form of scienter – and therefore does not apply to persons who are unfamiliar with the contents of proscribed materials – argue that proof of knowledge of a performer's minority is not essential." (Br. for Gov't 39-40.)

In an obscenity prosecution, the Government explained, a defendant who knows the contents of the materials in question knows all the facts that are relevant to the verdict of the judge or jury; extrinsic evidence regarding the circumstances under which visual depictions were produced simply does not bear on the question whether they are obscene." (Br. for Gov't 43.) On the other hand, "[m]aterials proscribed by section 2252 are characterized not simply by their depiction of sexually explicit conduct, but by the minority of the performer depicted therein." (Br. for Gov't 44.) And, it is the minority of the performer "that renders the act illegal." (*Id.*)

C. Congress, Not The Court, Must Define Federal Crimes.

Contrary to Judge Kozinski's "constitutional narrowing" theory, the Court is not free "to add a constraint to [a] statute that its drafters plainly had not meant to put there," (Pet. 24a n.6), to avoid declaring a statute unconstitutional. "Any other conclusion . . . would trench upon the legislative Powers vested in Congress by art. I, § 1 of the Constitution." *United States v. Locke*, 471 U.S. 84, 95 (1985). Moreover, "the definition of the elements of a criminal offense is entrusted to the legisiature, particularly in the case of federal crimes, which are solely creatures of statute," *Liparota*, 471 U.S. at 423, and Congress "must act within any applicable constitutional constraints in defining criminal offenses," *id.* at 424 n.6.

It is of course true, as the Government argues, that the Court will often strain to construe legislation so as to save it against constitutional attack, but it is also true that "it must not and will not carry this to the point of . . . judicially rewriting it. . . . " *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) (statute found unconstitutional on its face because the case involved freedom of travel, "a constitutional liberty closely related to rights of free speech and association"). *See Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("It is for Congress, not this Court, to rewrite the statute."); *United States v. Bass*, 404 U.S. 336 (1971) (Because a criminal offense "represent[s] the moral condemnation of the community, legislatures, and not courts, should define criminal activity.").

Where, as here, Congress has deliberately and clearly enacted a law that is overbroad, in the sense of restricting more speech than the Constitution permits, the statute must be stricken, *see R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 n.3 (1992), and declaring it unconstitutional serves as a forceful reminder to Congress to legislate narrowly – if at all – when criminalizing the circulation of all forms of presumptively protected expressive materials. *See Massachusetts v. Oakes*, 491 U.S. at 586 (opinion of Scalia, J., speaking for the Court on this point).[9]

The Government's defense of section 2252 ultimately comes down to its reliance on a variety of canons of statutory construction.[10] But all the cases cited by the Government unequivocally state that courts should not invoke these canons of construction to reach a result

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[9]With respect to legislation that tends to stir deep emotions (e.g., the regulation of child pornography) . . . the threat of an overbreadth invalidation may sometimes be important, at least for some legislators. It is at least plausible to think that in such cases legislators may be tempted to overreach, possibly because they consciously believe that the Supreme Court has erred in over protecting anti-social conduct. They may also, however, be sufficiently concerned with the consequences of overreaching – in the form of foregone opportunities to regulate and punish anti-social conduct – to alter their voting dispositions in light of First Amendment overbreadth doctrine.

Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 888-89 n.221 (1991).

[10] "As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites." *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1496 (1994) (footnote omitted).

"plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Government's reliance on *Morissette v. United States*, 342 U.S. 246 (1952), *Liparota*, and *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), (Br. for Gov't 13), is misplaced. It is true that criminal statutes ordinarily are presumed to require scienter, (Br. for Gov't 12-16), and that "the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law," (Br. for Gov't 13 (quoting *Liparota*, 471 U.S. at 426).) It is also true that in general, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." (Br. for Gov't 13 (quoting *United States Gypsum*, 438 U.S. at 438 (1978)).) Finally, it is true that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," and that on a number of occasions the Court has "read a state of mind component into an offense even when the statutory definition did not in terms so provide." (Br. for Gov't 13 (inner quote and citations omitted).) These statements hardly prove the Government's case, however.

First, courts *have* found a *mens rea* in section 2252, although it is not knowledge of minority. *Moncini*, for example, concluded that the word "knowingly" in section 2252 can be construed to modify transport, ships or mails in conjunction with "any visual depiction [as defined by the statute]." Under this construction, "the Government must prove that the defendant had knowledge of the

contents of the visual depictions and knowledge that they were to be mailed." With this scienter requirement, section 2252 would not reach "a post office employee who 'knowingly distributes' mail but knows nothing of its contents, or a film developer who for some reason returns an undeveloped role of film to a customer." *United States v. Gendron*, 18 F.3d 955, 959 (1st Cir. 1994).

Second, when Congress excluded knowledge of minority from section 2252 it was not an oversight, it was not a "simple omission of the appropriate phrase from the statutory definition." *United States Gypsum*, 438 U.S. at 438. Knowledge of minority was deliberately excluded from sections 2251 and 2252. The Government's argument that the phrase was deliberately omitted from section 2251, but accidently omitted from section 2252, finds no support in the text of the section or its legislative history.

Finally, the Government's reliance on the doctrine of lenity, (Br. for Gov't 13), is novel, ironic, and inappropriate. Lenity comes into operation only " 'at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.' " *Chapman v. United States*, 500 U.S. 453, 463 (1991) (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)). Moreover, lenity has been used to spare defendants from punishment, but never (to respondents' knowledge) to *uphold* a criminal conviction. *See Hughey v. United States*, 495 U.S. 411, 422 (1990) (lenity principles "demand resolution of ambiguities in criminal statutes in favor of the defendant").

In this case, Congress has deliberately and unequivocally excluded knowledge of minority – "the moral and

criminal heart of the matter," *Gendron*, 18 F.3d at 959 – as an element of the crime. As a consequence, section 2252's overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's . . . legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Because the section is excessively overbroad, the Court has "no choice but to strike it down on its face, notwithstanding its laudable objectives." *Massachusetts v. Oakes*, 491 U.S. at 590 (Brennan, J., joined by Marshall & Stevens, JJ., dissenting).

II.

THE DEFINITION OF SEXUALLY EXPLICIT CONDUCT OF A MINOR IS UNCONSTITUTIONALLY VAGUE AND BROAD.

Section 2252 is a blanket prohibition; it brooks no exceptions. Unlike the statute in *Osborne v. Ohio*, 495 U.S. 103, 105 (1990), there is no exception "for bona fide artistic, medical, scientific, educational, religious, governmental, or judicial material," or "for the proper use of material by physicians, psychologists, sociologists, scientists, teachers, librarians, clergymen, prosecutors, judges, or other persons having a proper interest in the material." Nor is there an exception, as in *Oakes*, "for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library." 491 U.S. at 577.

As the Ninth Circuit stated, "section 2252 potentially applies to all kinds of recipients or distributors of videotapes and magazines," (Pet. 15a), and it would reach everyone who, for example, knows the contents of the

works mentioned, *supra* note 8, and who knowingly transports or receives the work.

Additionally, the definition of "sexually explicit conduct" set forth in section 2256(2) is much broader than one might expect and it is much broader than the definition of "sexual conduct" used in the New York statute upheld in *Ferber*. *See United States v. Kantor*, 677 F. Supp. at 1430. *Kantor* concluded that the application of the statute to persons 16 and 17 years old, and the broad definition of sexually explicit conduct, rendered the Act overbroad. It concluded that the statute should be struck down facially, and that Congress should be sent back to the task of designing a statute, the reach of which is more clearly limited to the protection of children. *Id.* at 1432. It declined to do so, however, "at least until such time as a case is presented in which the alleged overbreadth of the statute is urged by someone affected by it." *Id.* at 1432.

A. Section 2256(2)(E) Is Vague And Overbroad.

Section 2256(2)(E) defines "sexually explicit conduct" as meaning "actual or simulated lascivious exhibition of the genitals or pubic area of any person." Prior to the 1984 amendments the word "lewd" was used instead of "lascivious." Congress made the change because

> "lewd" has in the past been equated with "obscene"; this change is intended to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful.

130 Cong. Rec. S3510, S3611 (daily ed. Mar. 30, 1984) (remarks of Sen. Spector).

The statute upheld in *Ferber* defines "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Ferber*, 458 U.S. at 751. The Court identified this definition with the one given in *Miller v. California*, 413 U.S. 15 (1973). *Miller* made plain that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive *'hardcore'* sexual conduct." *Id.* at 27 (emphasis added). *Miller* and its progeny used the term "hardcore" to fix the substantive constitutional limitation on the type of material that could be found to be beyond the protection of the First Amendment. In *Jenkins v. Georgia*, 418 U.S. 153 (1974), for example, the Court reversed an obscenity conviction stating that the film involved was not "hardcore sexual conduct," and that "as matter of constitutional law," it is not "outside the protection of the First and Fourteenth Amendments. . . . " *Id.* at 161.

Section 2256(2)(E) is not confined to "hardcore" sexual conduct. Indeed, its key words are undefined. Because the statute does not define, for example, what the word "lascivious" means, jurors are told that they "must use their common sense in deciding whether the pictures are lascivious . . . . " *United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir.), *cert. denied*, 498 U.S. 1024 (1990). The factors jurors are regularly told to consider are "whether the pictures are intended or designed to elicit sexual response from the viewer"; "whether the picture portrays the child as a sexual object"; "whether the child is depicted in an unnatural pose, considering the age of

the child"; "whether the picture suggests sexual coyness or willingness to engage in sexual activity"; "whether the setting is sexually suggestive"; "whether the focal point of the pictures is on the child's genitals or pubic area"; "[t]he captions on the pictures." *Id.* at 1390-91 n.4.

After examining the construction given section 2256(2)(E), the court in *American Library Association v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989), *vacated as moot sub nom., American Library Association v. Barr*, 956 F.2d 1178 (D.C. Cir. 1992), concluded that "it is fair to conclude that any frontal nude image of a person in what might otherwise be called an 'erotic' pose is likely to be included as 'lascivious,' " and that "it is often difficult, if not impossible, to determine from looking at a nude image whether the performer is at least 18 years of age." *Id.* at 480. Accordingly, the court declared section 2257 of the Act (the record-keeping provision) unconstitutional because it was not narrowly tailored to ban only child pornography. *Id.* at 477.

Congress then amended section 2257 by narrowing the definition of "sexually explicit conduct" to exclude "lascivious exhibition of the genitals or pubic area." *Barr*, 956 F.2d at 1186 n.5. The amendment was made so that the statute would comply with *Thornburgh*. *Id.* at 1186; *see* 136 Cong. Rec. S9029 (daily ed. June 28, 1990) (statement of Sen. Thurmond). It thus appears that Congress concluded that section 2256(2)(E) was not crafted with sufficient precision to withstand First Amendment scrutiny. *See Boos v. Barry*, 485 U.S. 312, 329 (1988) ("The claim that the [statute] is sufficiently narrowly tailored is gravely weakened; if ever it did so, Congress no longer considers this statute necessary. . . .

Relying on congressional judgment in this delicate area we conclude that the . . . [statute] is not crafted with sufficient precision to withstand First Amendment scrutiny.").

Like the statute declared unconstitutional in *Boos*, section 2256(2)(E) is not sufficiently narrowly tailored to withstand First Amendment scrutiny. Nevertheless, section 2256(2)(E) still defines "sexually explicit conduct" for purposes of determining whether a person has violated section 2252.

B. Section 2256(2)(D) Is Vague And Overbroad.

Section 2256(2)(D) defines "sexually explicit conduct" as meaning "actual or simulated sadistic or masochistic abuse." Prior to the 1984 amendments, it was defined as "sado-masochistic abuse (for the purpose of sexual stimulation)."

When the bill was under consideration in 1977, Assistant Attorney General Wald observed that "sadism" and "masochism" are "broad enough to cover activities which are not necessarily sexually oriented," because "[t]hey could include filmed episodes of physical mistreatment of orphans, child laborers or inmates of a juvenile detention facility or a child inflicting injury upon himself." 1977 Senate Report 22. Since such portrayals would have virtually no sexual appeal, she stated, these terms "should be modified to refer to sexually oriented sadism and masochism." *Id.* at 22. The 1977 Act accordingly put in the words "(for the purpose of sexual stimulation)" following the words "sado-masochistic abuse." When in 1984 Congress substituted "sadistic or masochistic abuse" for

"sado-masochistic abuse" and *deleted* the words "(for the purpose of sexual stimulation)," it greatly expanded the reach of the section and rendered it vague and overbroad.

C. Section 2256(1) Sweeps More Broadly Than Is Warranted By The Evil At Which The Statute Aims.

Section 2256(1) defines a minor as "any person under the age of 18 years." The 1977 Act defined a minor as a person under 16 years of age, as did the New York statute upheld in *Ferber*.

Comments on the floor reveal that the legislation was intended to reach young children, specifically those under the age of 16 who were deemed incapable of consent. Senator Goldwater stated, "when I say children, I'm talking about children under 10 years of age or in their early teens." 123 Cong. Rec. 33,049 (1977). Senator Morgan stated, "reliable evidence indicates that children as young as three and four or five are routinely involved in this sickening enterprise. . . . Many slightly older children, age 12 or 13 or 14, who become involved in pornographic films, are runaways . . . . " *Id.* at 33058.

The reason for raising the age of minority to 18 is set forth in H.R. Rep. No. 516, 98th Cong., 2nd Sess. 3 (1984):

> The committee concluded that the age of the children encompassed by the Act should be increased from 16 to 18 years. The prosecution for distribution are most often based solely on the pornography which is the subject of the offense; the children cannot be located. Based on the pictures alone, the prosecution must show

> that the child is under the age of 16. This is extremely difficult once the child shows any sign of puberty. Raising the age to 18 which would facilitate the prosecution of child pornography cases and raise the effective age of the protection of children from these practices, probably not to 18 years of age, but perhaps to 16.

The House Report reveals that Mark M. Richards, Deputy Assistant Attorney General, advised the Judiciary Committee that the Administration's proposed bill did not suggest that the age of minority be raised from 16 to 18; that the New York statute involved in *Ferber* defined a minor as a person under 16 years age; and that by extending the reach of the Act to 16 and 17 years olds, it would reach persons "whom for some purposes society regards as adults." *Id.* at 14. But he added "[i]f the law were amended to protect minors under the age of 18, rather than 16, it would be easier to prosecute cases in which 14 or 15 year olds have been sexually exploited, but regarding whom actual proof of age is not available."

Congress' action in raising the age of minority to 18 years of age is doubly flawed. First, when the statute is applied to 16 and 17 year old persons, its overbreadth "is not limited simply to situations which are rare and insignificant." *Kantor*, 677 F. Supp. at 1432. Second, since the reason for raising the age of minority is not compelling, it "is not crafted with sufficient precision to withstand First Amendment scrutiny." *Boos*, 485 U.S. at 329.

While the Government may regulate the content of constitutionally protected speech in order to promote the

compelling interest of protecting the physical and psychological well-being of minors, " 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.' " *Sable Communications, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980)). "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.*

III.

IN NO EVENT SHOULD RESPONDENTS' CONVICTION BE AFFIRMED.

A. Throughout the proceedings, respondents argued that the indictment was fatally defective because it did not allege that they knew the person depicted was under 18 years of age. They argued that even if section 2252 were rewritten, "the indictment would still be fatally defective because it does not allege that defendants knew Traci Lords was under 18 years of age. *Russell v. United States*, 369 U.S. 749, 771 (1962); *Stirone v. United States*, 261 U.S. 212, 218 (1960) . . . . " (JA 157.) The Ninth Circuit did not address this issue, "[i]n light of [its] ruling on the constitutionality of the Act." (Pet. 4a n.3.) Accordingly, if the Court fails to hold section 2252 unconstitutional on its face, it should dismiss the indictment, *see Turner v. City of Memphis*, 369 U.S. 350 (1962), or it should remand the case to the court below to resolve the issue.

B. Because the Ninth Circuit concluded that section 2252 was unconstitutional on its face, it did not reach

respondents' argument that the Traci Lords tapes were not "child pornography." Traci Lords was a married woman over 16 years of age when she made the videotapes respondents distributed and received. She held herself out as an adult, and the videotapes were marketed as adult entertainment, not "kiddie porn." (JA 140.) On seeking employment as a performer, Ms. Lords provided a California driver's license, a U.S. passport and a birth certificate showing her to be over 18 years of age. (JA 142.) She showed these identifications to Penthouse, before it published her picture in its September 1984 issue. (JA 143.) The Government never alleged that the videotapes were obscene, and they are protected by the First Amendment if, as respondents claim, they are not child pornography.

This issue should be remanded to the court below if the statute is not declared unconstitutional on its face, or if the indictment is not found to be constitutionally defective.

CONCLUSION

For the aforesaid reasons, the Court should affirm the Ninth Circuit's judgment herein.

Respectfully submitted,

FLEISHMAN, FISHER & MOEST

STANLEY FLEISHMAN
Counsel of Record
BARRY A. FISHER
DAVID GROSZ
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077

Counsel for Respondents

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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. (1977) 7
H.R. Rep. No. 696, 95th Cong., 1st Sess. (1977) 7
H.R. Rep. No. 536, 98th Cong., 1st Sess. (1983) 13
H.R. Rep. No. 910, 99th Cong., 2d Sess. (1986) 8
S. Rep. No. 438, 95th Cong., 1st Sess. (1977) 5-6
S. Rep. No. 169, 98th Cong., 1st Sess. (1983) 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-723

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I. In order to prevail in this case, respondents must do more than demonstrate that 18 U.S.C. 2252 is ambiguous with respect to the question whether knowledge of a performer's minority is an essential element of the distribution offense. They must demonstrate that Congress's intent not to require scienter is so clear as to overcome both the "background assumption of our criminal law," that scienter is required, *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), and the principle that federal courts will "construe [a] statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).

Respondents have fallen far short of making that sort of showing.

Respondents acknowledge that "criminal statutes ordinarily are presumed to require scienter." Resp. Br. 29. They argue, however, that "[i]n this case, Congress has deliberately and unequivocally excluded knowledge of minority * * * as an element of the crime," *id.* at 30-31, and that Section 2252 therefore is unconstitutional. Neither the text nor the history of Section 2252 supports that contention, and no other court of appeals has accepted it.[1]

A. Respondents first argue that the word "knowingly" cannot be read to refer to the phrase "minor engaging in sexual conduct" because the latter "occurs in an independent clause set off by indentations and in outline form." Resp. Br. 15-16.[2] As we explain in our opening

[1] We note that several courts of appeals have considered constitutional challenges to Section 2252 after the Ninth Circuit issued its decision in the instant case. Those courts have varied significantly in their reasoning (and in their articulation of the scienter requirement), but all have expressly declined to follow the Ninth Circuit and have upheld the statute against constitutional attack. See *United States* v. *Gendron*, 18 F.3d 955, 957-960 (1st Cir. 1994), petition for cert. pending, No. 93-9593; *United States* v. *Gifford*, 17 F.3d 462, 471-473 (1st Cir. 1994); *United States* v. *Colavito*, 19 F.3d 69, 70-71 (2d Cir. 1994), petition for cert. pending, No. 93-8815; *United States* v. *Cochran*, 17 F.3d 56, 58-61 (3d Cir. 1994), petition for cert. pending, No. 93-8697; *United States* v. *Burian*, 19 F.3d 188, 190-191 (5th Cir. 1994); *United States* v. *Schmeltzer*, 20 F.3d 610, 612 (5th Cir. 1994), petition for cert. pending, No. 93-9244; *United States* v. *Brown*, No. 93-5677 (6th Cir. May 26, 1994).

[2] Similarly, amicus curiae Law and Linguistics Consortium, relying upon the grammatical structure of Section 2252, argues that "according to principles of standard English" the word

brief, however, the legislative history affirmatively indicates that the word "knowingly" in Section 2252 was intended to refer to the minority of the performer. See Gov't Br. 18, 28, 36-37. In any event, the presumption that criminal statutes "require some kind of guilty knowledge with respect to major wrong-creating elements of major crimes," *United States* v. *Gendron*, 18 F.3d 955, 958 (1st Cir. 1994), petition for cert. pending, No. 93-9593, would apply even if the word "knowingly" did not appear in Section 2252 at all, since "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

Respondents shrink, it should be noted, from the logical implications of their grammatical analysis. The elements of minority of the performer and sexually explicit conduct are both contained in the same subclause of 18 U.S.C. 2252(a)(1) and (2)—indeed, as part of the same prepositional phrase ("of a minor engaging in sexually explicit conduct") in each subclause.[3] If the

"knowingly" cannot properly be taken to refer to the minority of the model or performer. Amicus Br. 3; see *id.* at 6-7.

[3] At the time of the acts alleged in the indictment, 18 U.S.C. 2252(a)(1) (1988) established criminal penalties applicable to

> (a) Any person who —
>
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct[.]

grammatical structure of Section 2252 precludes application of the knowledge requirement to the minority of the performer, that structure would also appear to preclude application of the knowledge requirement to the presence of "sexually explicit conduct." See Gov't Br. 41.[4] So construed, Section 2252's severe criminal penalties would apply to transporters (including common carriers), distributors, and receivers who lacked any knowledge of the contents of proscribed visual depictions. Not surprisingly, respondents do not assert that Congress intended to enact a provision of such sweep and doubtful constitutionality. See *Smith* v. *California*, 361 U.S. 147, 153-154 (1959). To the contrary, they rely heavily on legislative history indicating that knowledge of sexually explicit content *is* an element of the distribution offense. See Resp. Br. 18-20. Respondents make no effort, however, to address the contradiction between their linguistic and legislative history arguments.

Respondents also rely (Resp. Br. 15) on *United States* v. *Yermian*, 468 U.S. 63 (1984). The Court there construed 18 U.S.C. 1001, which establishes criminal penalties for any person who "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false,

---

Section 2252(a)(2) was similarly structured and applied to the receipt or distribution of such materials.

[4] Respondents agree with this reading of the text of 18 U.S.C. 2252. See Resp. Br. 15 ("Grammatically, the adverb 'knowingly' used in section 2252(a)(1) modifies the verbs 'transports' and 'ships,' the interstate nexus requirement, and the phrase 'visual depiction.'"). Similarly, amicus curiae Law and Linguistics Consortium states that "[t]he sentence in the statute requires knowledge of the act of transportation and arguably knowledge that the object transported is a depiction." Amicus Br. 7.

fictitious or fraudulent statements or representations." The Court held that "the terms 'knowingly and willfully' modify only the making of 'false, fictitious or fraudulent statements,' and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency." 468 U.S. at 69. Petitioners' reliance on *Yermian* is misplaced, however, because the Court in that case expressly noted that "[j]urisdictional language need not contain the same culpability requirement as other elements of the offense," *id.* at 68, and because the jurisdictional language appeared in a phrase that was separate from (and preceded) the portion of the statutory text that was introduced by the scienter terms "knowingly and willfully." *Id.* at 69. In addition, as this Court subsequently explained, all parties in *Yermian* agreed that a conviction under Section 1001 "required proof at least that the defendant 'knowingly and willfully' made a false statement," and thus "agreed that the Government had to prove the defendant's *mens rea*." *Liparota*, 471 U.S. at 432. Under Section 2252, by contrast, the minority of a particular performer may be the fact that separates criminal acts from conduct that is constitutionally protected. *Yermian* does not cast doubt upon the principle that criminal statutes are presumed to require scienter with respect to such a fundamentally dispositive fact.

B. Respondents also contend that the legislative history demonstrates an intent by Congress not to require knowledge of minority in prosecutions brought under Section 2252. See Resp. Br. 18-23. They rely in particular on Assistant Attorney General Wald's suggestion that "[t]o clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the [Section

2252] offense." S. Rep. No. 438, 95th Cong., 1st Sess. 29 (1977) (*quoted at* Resp. Br. 19-20). Assistant Attorney General Wald did not state, however, that the bill as written would be given that construction; rather, she recommended that legislative history to that effect should be produced in order "[t]o clarify the situation." *Ibid.* No such history was ever developed. See *United States* v. *Gendron*, 18 F.3d at 960 ("We have found nothing in the statute or the legislative history * * * to suggest that Congress adopted [Assistant Attorney General Wald's] recommendation."). To the contrary, Senator Roth—who introduced an amendment reinstating the distribution offense after Section 2252 was excised from the bill by the Senate Judiciary Committee—expressed the view that Section 2252, "limited as it is by the phrase 'knowingly,' insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography * * * are subject to prosecution." 123 Cong. Rec. 33,050 (1977); see Gov't Br. 26-28.

Respondents contend that "[t]he conference committee accepted Ms. Wald's recommendation 'with the intent that it is not a necessary element of a prosecution that the defendant know the actual age of the child.' H.R. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977) [Conference Report]." Resp. Br. 20. Read in context, however, the quoted portion of the Conference Report supports, rather than undermines, the conclusion that knowledge of minority is required under Section 2252. The full passage is as follows:

> The Senate bill contains an express requirement in proposed section 2251(a) that the crime be committed 'knowingly.' The House amendment does not. The conference substitute accepts the House provision with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.

H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977). The passage quoted by respondents thus clearly deals with Section 2251 rather than Section 2252. The Conference Report does not directly address the question whether knowledge of minority is a necessary element of the distribution offense under Section 2252. The Report demonstrates, however, that the word "knowingly" was deleted from Section 2251 for the specific purpose of making clear that knowledge of minority is not required to establish an offense under that Section. See H.R. Conf. Rep. No. 811, *supra*, at 5; see also H.R. Rep. No. 696, 95th Cong., 1st Sess. 12 (1977) (explaining that the word "knowingly" was deleted from the House version of Section 2251 "at the suggestion of the Department of Justice. * * * It is not the intention of the committee to require the Government to prove the defendant knew the child was under age 16."). Congress's simultaneous retention of the word "knowingly" in Section 2252 surely implies that knowledge of minority was intended to be a necessary element of the distribution offense.

Against this backdrop, we are perplexed by respondents' assertion that "[k]nowledge of minority was deliberately excluded from sections 2251 and 2252," and that "[t]he Government's argument that the phrase was deliberately omitted from section 2251, but accidentally omitted from section 2252, finds no support in the text of the section or its legislative history." Resp. Br. 30. Our contention that knowledge of minority is not required under Section 2251 is based on the deletion of the word "knowingly" from that provision and on the

Conference and House Reports' express statement that such knowledge is not an element of the production offense. Neither of those factors applies to Section 2252.[5]

Nor was there anything illogical about Congress's decision to require knowledge of minority in Section 2252 prosecutions but not in those brought under Section 2251.[6] As we point out in our opening brief (see Gov't Br. 20-21 & n.14), distributors and receivers of visual depictions may lack practical means of reliably determining the ages of performers with whom they have no direct contact. Imposition of criminal liability on those

[5] In arguing that "[t]he critical language used in sections 2251 and 2252 is identical" (Resp. Br. 21), respondents rely on Section 2251(c)(1). That provision establishes criminal penalties for any person who "knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct." The House Report accompanying that provision states that "[t]he government must prove that the defendant knew the character of the visual depictions as depicting a minor engaging in sexually explicit conduct but need not prove that the defendant actually knew the person depicted was in fact under 18 years of age or that the depictions violated Federal law." H.R. Rep. No. 910, 99th Cong., 2d Sess. 6 (1986).

Section 2251(c) was added to the statute in 1986, see Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 2, 100 Stat. 3510, and therefore it sheds little light on the proper construction of Section 2252. Moreover, Section 2251(c) is something of an anomaly, since it applies to advertisements both to produce and to receive proscribed materials.

[6] In particular, there is no basis for respondents' assertion that by contending that Section 2251 does not require knowledge of minority, the government "implicitly acknowledges that section 2251 is therefore unconstitutional." Resp. Br. 10.

who lack knowledge of a performer's minority might chill the distribution and receipt of non-obscene materials that in fact do not depict underage performers and are therefore constitutionally protected. Cf. *Smith* v. *California*, 361 U.S. 147, 153-154 (1959). No similar chilling effect is likely to follow from Congress's decision not to require knowledge of minority under Section 2251, since "producers are in a position to know or learn the ages of their employees." *United States* v. *United States District Court for Central District of California*, 858 F.2d 534, 543 n.6 (9th Cir. 1988).

C. In our opening brief we argue that, even if Section 2252 as enacted in 1978 would not have been construed to require knowledge of minority, the statute in its current form should be so construed. See Gov't Br. 37-39. Respondents argue that amendments to Section 2252 enacted in 1984 could not have altered the applicable scienter requirements; they rely primarily on the fact that "the 1984 amendments were silent concerning the word 'knowledge.'" Resp. Br. 23.[7] We acknowledge that

[7] Respondents also contend that "section 2252 had been authoritatively construed as not requiring knowledge of minority * * * prior to the 1984 amendments." Resp. Br. 24 (citing *United States* v. *Langford*, 688 F.2d 1088 (7th Cir. 1982), cert. denied, 461 U.S. 959 (1983)). Respondents considerably overstate the significance of *Langford*. The Seventh Circuit opinion in that case contains a footnote describing jury instructions given by the district court, and those instructions contain no reference to knowledge of minority. See 688 F.2d at 1089 n.1 (*quoted at* Resp. Br. 17 n.6). The defendant apparently did not raise the issue of scienter, however, and the Seventh Circuit did not address it. There is consequently no basis for respondents' assertions that the court in *Langford* "authoritatively construed" the statute not to require knowledge of minority.

Respondents contend as well that the 1984 amendments cannot be construed to impose a new knowledge requirement because "the

neither the 1984 amendments nor their legislative history directly addresses the question whether knowledge of minority is required under Section 2252. The applicability of established canons of statutory construction, however, does not depend upon express congressional references to their operation. Nor is there anything novel about the proposition that amendments to one portion of a statutory provision may alter the manner in which the provision as a whole is applied. By deleting the word "obscene" from Section 2252, and thereby extending its reach to non-obscene materials, the 1984 amendments changed the minority of the child performer from a fact that could enhance a defendant's sentence to a fact that separates lawful from unlawful conduct. See Gov't Br. 38. That change rendered applicable the presumption that a criminal defendant must ordinarily "know the facts that make his conduct illegal," *Staples* v. *United States*, 114 S. Ct. 1793, 1797 (1994)—a canon of construction that does not apply to facts bearing only on the severity of a defendant's sentence. See Gov't Br. 15-16 & n.10.[8] In the absence of

changes made in 1984 all had the purpose of making it easier for the prosecutor to obtain a conviction." Resp. Br. 23. But because the absence of any scienter requirement as to minority would raise grave questions concerning the constitutionality of Section 2252 as applied to non-obscene materials, recognition of a scienter requirement can surely be characterized as "making it easier for the prosecutor to obtain a conviction."

[8] In the original version of Section 2252, the word "obscene" modified "visual or print medium" (now "visual depiction") in the introductory clause of both subsection (a)(1) and subsection (a)(2). See Pub. L. No. 95-225, § 2(a), 92 Stat. 7-8. It seems clear as a purely grammatical matter that the word "knowingly" applied to the word "obscene," with the result that the government would have been required to show that the defendants knew the facts about the visual or print medium that rendered it obscene.

persuasive evidence of congressional intent rebutting that presumption, Section 2252 in its current form should therefore be read to require knowledge of minority, regardless of whether such knowledge would have been required when the statute was first enacted.

II. Respondents also argue (Resp. Br. 31-38) that the judgment of the court of appeals should be affirmed on any of three alternative grounds: (1) that 18 U.S.C. 2256(2)(E) (defining "sexually explicit conduct" to include "actual or simulated * * * lascivious exhibition of the genitals or pubic area") is vague and overbroad; (2) that 18 U.S.C. 2256(2)(D) (defining "sexually explicit conduct" to include "actual or simulated * * * sadistic or masochistic abuse") is vague and overbroad; and (3) that 18 U.S.C. 2256(1) (defining "minor" to include "any person under the age of 18 years") sweeps more broadly than is necessary to serve the ends of the statute. The court of appeals rejected each of those contentions. See Pet. App. 5a-8a. Although this Court has jurisdiction to consider those arguments, see *Dandridge* v. *Williams*, 397 U.S. 471, 475-476 n.6 (1970), the Court may decline to entertain them "[i]n the absence of a strong suggestion of an abuse of [the lower court's] discretion or an indication that the issues are of sufficient general importance to justify the grant of certiorari." *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975). Respondents have failed to identify any conflict among the circuits on these issues or any other consideration justifying this Court's plenary review—especially since respondents failed to identify the issues as alternative grounds for affirmance in their response to the certiorari petition. See *City of Oklahoma City* v. *Tuttle*,

471 U.S. 808, 815 (1985). In any event, respondents' arguments are without merit.[9]

A. As the court of appeals concluded, respondents' challenges to Sections 2256(2)(D) and (E) were "essentially answered in *Ferber*, which upheld the constitutionality of a similar statute." Pet. App. 7a. The statute at issue in *New York* v. *Ferber*, 458 U.S. 747 (1982), defined "sexual conduct" to include "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* at 751. This Court held that the statute "incorporate[d] a definition of sexual conduct that comports with" applicable constitutional principles and "sufficiently describe[d] a category of material the production and distribution of which is not entitled to First Amendment protection." *Id.* at 765.

As the court of appeals noted (see Pet. App. 8a), there is no meaningful distinction between the terms "sado-masochistic abuse" (in the New York statute) and "sadistic or masochistic abuse" (in Section 2256(2)(D)). The word "lascivious" (in Section 2256(2)(E)) was substituted for "lewd" in 1984 in order "to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful." See 130 Cong. Rec. 7196 (1984) (remarks of Sen. Specter). The courts of appeals have uniformly rejected the contention

[9] Respondents also argue (Resp. Br. 38-39) that the indictment in this case was fatally defective, and that the tapes in question did not constitute "child pornography." As respondents point out, the Ninth Circuit did not reach those issues. See Pet. App. 4a-5a & n.3. Although we believe that those contentions are meritless and that respondents' convictions should ultimately be affirmed, we agree that if this Court reverses the judgment of the Ninth Circuit, the case should be remanded to permit the court of appeals to consider the issues on which it has not yet ruled.

that this change rendered the statute vague or overbroad. See, *e.g.*, *United States* v. *Wiegand*, 812 F.2d 1239, 1243-1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987); *United States* v. *O'Malley*, 854 F.2d 1085, 1086-1087 (8th Cir. 1988); *United States* v. *Reedy*, 845 F.2d 239, 241 (10th Cir. 1988), cert. denied, 489 U.S. 1055 (1989); *United States* v. *Rubio*, 834 F.2d 442, 447-448 (5th Cir. 1987).

B. The New York child pornography statute upheld in *Ferber* defined "child" to include persons under 16 years of age. 458 U.S. at 751. The 1984 amendments to the federal Act raised the age of majority from 16 to 18. See Child Protection Act of 1984, Pub. L. No. 98-292, § 5(a)(1), 98 Stat. 205. As respondents note (Resp. Br. 36-37), this change was intended in part to "facilitate prosecution and conviction in cases in which the age of the child depicted cannot be proven by positive identification of the child." H.R. Rep. No. 536, 98th Cong., 1st Sess. 7 (1983).[10] Congress was motivated as well, however, by the belief that "[o]n grounds of policy and logic, it seems to us incredible that a 17-year old adolescent is prohibited from drinking, voting or signing a valid contract, yet is permitted to star in a pornographic movie." S. Rep. No.

[10] The House Report explained: "Usually the child who is depicted in child pornography cannot be located. Proof of the child's age has therefore been by circumstantial evidence. This meant that unless the child appeared to have not yet attained puberty (and therefore was definitely under age 16), an offense could not be proven. By raising the age to 18, if the child depicted does not look like an adult, a conviction can be obtained." H.R. Rep. No. 536, *supra*, at 7-8 (1983). See also *id.* at 3 ("Raising the age * * * would facilitate the prosecution of child pornography cases and raise the effective age of the protection of children from these practices, probably not to 18 years of age, but perhaps to 16.").

169, 98th Cong., 1st Sess. 8 (1983) (quoting letter from Gregory A. Loken to Senator Specter).[11]

Congress surely has the constitutional authority to determine that 16- and 17-year-olds require federal protection against sexual exploitation. This Court noted in *Ferber* that a substantial number of state child pornography laws covered persons up to 18 years of age, 458 U.S. at 764 n.17; no Justice in that case expressed doubt as to the validity of such statutes. The Court has subsequently upheld an Ohio child pornography statute that defined "minor" to include all persons less than 18 years old. *Osborne* v. *Ohio*, 495 U.S. 103, 113 n.9 (1990).[12] See also *United States* v. *Freeman*, 808 F.2d 1290, 1293 (8th Cir.) (upholding Section 2256(1) against constitutional challenge), cert. denied, 480 U.S. 922 (1987). Respondents' challenge is therefore without merit.

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[11] The Senate Report noted that "[t]he sponsors of S. 1469 concur with Mr. Loken and believe that the Federal law should be extended to protect children aged 16 and 17." S. Rep. No. 169, *supra*, at 8 (1983).

[12] The Court stated: "We * * * do not find any merit to Osborne's claim that [the Ohio statute] is unconstitutionally vague because it does not define the term 'minor.' Under Ohio law, a minor is anyone under eighteen years of age." 495 U.S. at 113 n.9.

For the reasons stated above, and in the opening Brief for the United States, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JULY 1994

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(6)

No. 93-723

In The Supreme Court Of The United States

October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

X-CITEMENT VIDEO, INC.
and RUBIN GOTTESMAN,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF MORALITY IN MEDIA, INC. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE UNITED STATES AND BRIEF ATTACHED

Paul J. McGeady, Esq.
Attorney For Movant-Amicus Curiae
475 Riverside Drive
New York, NY 10115
212-870-3232

Robert Peters
475 Riverside Drive
New York, NY 10115
Of Counsel

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STATEMENT

Morality In Media, Inc. hereby respectfully moves for leave pursuant to Rule 37 of the Rules Of The Supreme Court Of The United States To File The Attached Brief *Amicus Curiae* in this case. The consent of the Attorney for the Petitioner has been obtained and filed with the court. The consent of the Attorney for the Respondents was requested but has not been received.

THE AMICUS

Morality In Media is a New York not-for-profit interfaith charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates, chapters and members in various states of the Union. Its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

INTEREST OF AMICUS

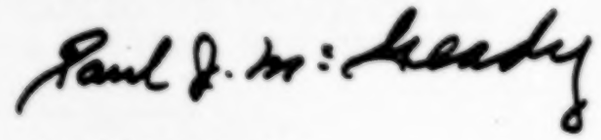
The interest of *Amicus* reflects its continuing interest in the decisions of this Court involving the balancing of constitutional rights and restrictions on obscene material and child pornography. This case involves the validity of a federal child pornography law. Amicus, in the past has been instrumental in supporting and strengthening amendments to the child porn law. In 1983-1984 this organization strongly supported amendments to the child porn law to remove the obscenity requirement and the "for pecuniary profit" language and later strongly objected to an attempted amendment to exempt simulated child porn. We had previously filed an amicus brief with this Honorable Court in *New York v. Ferber*, 458 U.S. 749, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

Morality In Media believes that the brief attached and the relevant case law cited emphasizes the great importance that the Court should give to statement of the sponsor of the amendment to the statute. It further believes that the statement of the sponsor in this case is dispositive of the

legislative intent and perhaps of the controversy, a position that may not be taken by any of the parties.

Morality In Media files this motion and attached brief because it believes that the decision in this case will have a direct and lasting effect on the ability of the United States to eliminate the evil of child pornography. It is our belief that its brief contains relevant matter and case law that may not be brought to the attention of the Court by the parties.

Respectfully submitted,



Paul J. Mc Geady
Attorney For Movant-
Amicus Curiae
Morality In Media, Inc.
475 Riverside Drive
New York, New York 10115
212-870-3232
(Counsel of Record)

Of Counsel
Robert Peters
April 5, 1994

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BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE IN SUPPORT OF THE UNITED STATES

Paul J. Mc Geady
Attorney for Amicus Curiae
Morality In Media, Inc.
475 Riverside Drive
New York, New York 10115
212-870-3232
(Counsel of Record)

Robert Peters
475 Riverside Drive
New York, NY 10115
Of Counsel

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INTEREST OF AMICUS

Since its foundation in 1968 Morality In Media has been combatting obscenity and child pornography by constitutional means. It recognizes the importance of the instant litigation to the continuing effectiveness of the federal child pornography laws.

The founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography." The Hill-Link Minority Report was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4, 93 S.Ct. 2680, 2684,37 L.Ed.2d 492, 497 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 58 n.7, 8, 93 S.Ct. 2628, 2635, 37 L.Ed. 2d 446,457 (1973).

More recently, Morality In Media has participated as Amicus in *Federal Communications Commission v. Pacifica*

Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989); *Action for Children's Television v. FCC, cert. denied*, 112 S.Ct. 1282 (1992); and *Ferris J. Alexander v. United States*, 113 S.Ct. 2766 (1993).

SUMMARY OF ARGUMENT

Morality In Media first postulates that prior cases indicate that this Honorable Court can and should construe the child porn statute under review to include a guilty knowledge element as to the age of the performer or, more precisely, knowledge that the material is child pornography.

It then suggests that where the law is unclear the Court may, and should, resort to the legislative history and give particular attention to the statement of the Bill's Sponsor.

If the Court decides to read into the statute a mens rea requirement, Amicus suggests that such a guilty knowledge requirement be one that does not mandate that the government produce any extraordinary evidence to conclusively demonstrate the Respondents state of mind but permit it to prove, by reference to facts and circumstances surrounding the case, that Respondents knew they were dealing in child pornography.

ARGUMENT

I

THIS COURT MAY AND SHOULD AUTHORITATIVELY CONSTRUE 18 U.S.C. 2252 TO INCLUDE A REQUIREMENT OF SCIENTER AS TO AGE.

Judge Kozinski, in a concurring opinion in *United States v. O'Mara*, 963 F.2d 1288 at 1294 (9th Cir. 1992), concisely summed up the meaning of prior opinions of this Honorable Court on the right and duty to read a necessary mens rea requirement into a statute when he said:

> "*Morissette*[1] and *United States v. Gypsum*[2] create a rule of statutory interpretation: Courts are to interpret a federal criminal statute, or an element of a federal crime to contain a mens rea requirement unless the structure or language of the statutory text (or perhaps the legislative history) reveals a contrary congressional intent." (Emphasis added).

A pertinent quote from *Gypsum Company* is found in

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[1] *Morissette v. United States*, 342 U.S. 246 72 S.Ct. 240, 96 L.Ed.2d 288 (1952).

[2] *United States v. United States Gypsum Company*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978).

the 1985 *Liparota*[3] case.

> "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."

The Fifth Circuit in *Standard Oil of Texas*, reiterated the rule that courts may, by construction, import the element of knowledge into criminal statutes.[4]

Following *Smith v. California*[5] many states, as final arbiters of state law, authoritatively construed their obscenity statutes to include a scienter requirement. As early as 1962, the Arizona Supreme Court en banc, in authoritatively construing their statute to include a scienter requirement in *State v. Locks*,[6] said:

> "Since *Smith* was handed down in 1959 the

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[3] *Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 2088, 85 L.Ed.2d 434, 440 (1985).

[4] *Standard Oil Co. of Texas v. United States*, 307 F.2d 120 126 (5th Cir. 1962).

[5] 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

[6] 372 P.2d 724, 725 (Ariz. Sup. Ct. 1962).

highest courts of twelve states have been presented with... the construction to be given an obscenity statute which on its face does not require scienter. In nine of these jurisdictions the statutes have been upheld as impliedly containing the scienter requirement." (Emphasis supplied).

ARGUMENT

II

IN INTERPRETING 18 U.S.C. 2252 THE COURT SHOULD ACCORD SPECIAL RESPECT TO THE STATEMENTS OF THE SPONSOR.

United States v. Walker[7] quotes *Bifulco v. United States*[8] as the authority for the proposition that "where language of the" (criminal) "statute is unclear the legislative history and policies motivating the act should be consulted to discern the meaning of the act."

Pertinent legislative history in the instant case is afforded by the colloquy between Senator Percy and Senator Roth at 123 *Cong. Record* 33,050(1977). Senator Roth, the Sponsor of the Legislation, acknowledged that the term "knowingly" in his amendment meant that the distributor or seller must either have actual knowledge that the materials do

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[7] 514 F.Supp. 294, 302-303 (E.D. La. 1981).

[8] 447 U.S. 381, 391-399, 100 S.Ct. 2247, 2254-58, 65 L.Ed.2d 205, 213-18 (1980).

contain child pornographic depictions or second circumstances must be such that he should have had such actual knowledge.

Morality In Media suggests that this colloquy deserves great weight, and may be dispositive, in determining legislative intent. Sutherland on "*Statutory Construction*" Vol. 2A (1992 Revision), Section 48.15 Page 364 tells us;

> In the course of deliberations on a bill, legislators look to the sponsor and to the representative of the committee in charge of it, to be particularly well informed about its purpose, meaning and intended effect. In recognition of this fact, courts give consideration to statements made by a bill's sponsor ...*United States v. United Mine Workers of America*, 330 U.S. 258 91 L.Ed. 884, 67 S.Ct. 667 (1947); *United States ex rel Chapman v Federal Power Commission*, 345 U.S. 153, 98 L.Ed. 918, 73 S.Ct. 609 (1953); *Galvan v. Press*, 347 U.S. 522, 98 L.Ed. 911, 74 S.Ct. 737 (1954)."

Sutherland warns us that statements by sponsors must be evaluated cautiously in that he or she may sacrifice complete candor by reason of partisan interest in enactment of the bill. Obviously, however, in the instant case, it is extremely unlikely that "partisan interest" colored the remarks of Senator Roth.

Sutherland then informs us (Supplement to 2A Page 56)

that the rule that congressional intent may be inferred from the statement of the sponsor of the bill only applies where the statement is consistent with the statutory language and other legislative history quoting *De Vargas v. Mason & Hanger-Silas Mason Co. Inc.*, 911 F.2d 1377 (10th Cir. 1990) as his authority. *De Vargas* in turn at 1387 cites *Brock v. Pierce County*, 476 U.S. 253, 263, 106 S.Ct. 1834, 1840, 90 L.Ed.2d, 248 (1986) for this principle.

A reference to the *Brock* case at 263 gives us the following quotation:

> "Such statements by individual legislators" (here a Co-Sponsor) "should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress intent (*Grove City College v. Bell*, 465 U.S. 555, 567 (1984)".

Professor William N. Eskridge, Jr. of Georgetown University Law Center in His article in the U.C.L.A. Law Review[9] makes a strong statement on the importance of reliance on the statements of a bill's sponsor when he writes;

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[9] "*The New Textualism,*" 37 U.C.L.A. Law Review 621,637-38 (1990).

"Next only to Committee Reports in reliability are statements made by sponsors or floor managers and the Court relies on these statements routinely.[10](Emphasis supplied)

In the *Schwegmann*[11] case cited by Professor Eskridge,

we find the following:

"It is to the sponsors that we look when the meaning of the statutory words is in doubt.[12]

At another time this Honorable Court said:

"Remarks... of the sponsor of the language ultimately enacted are an authoritative guide to

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[10] Professor Eskridge quotes as his authority-*See e.g. Public Employees Retirement Sys. of Ohio v. Betts*, 109 S.Ct. 2854, 2867 (1989)...*Jett v. Dallas Independent School District*, 109 S.Ct. 2702, 2711-14 (1989;...*United States v. Taylor*, 108 S.Ct. 2413, 2418 & n.7. (1988);...*Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 584-88 (1988);... *Bowen v. Yuckert*, 482 U.S. 137, 152 n.10 (1987); *Piper v. Chris-Craft Indus. Inc.* 430 U.S. 1, 26-27,28-29, 31,34, (1977); *Huddleson v. United States*, 415 U.S. 814, 828 (1974); *Adickes v. S.H. Kress, Co.*,398 U.S. 144, 164 (1970);... *Rodrigue v. Aetna Casualty & Surety, Co.*, 395 U.S. 352, 358, 361-62 (1969); *Waterman S.S. Corp. v. United States*, 381 U.S. 252, 264-66 (1965)... *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

[11] Note 10, supra. at 394-95.

[12] Quoted with approval in *Edward J. De Bartolo* note 10 supra., at 585. *See also, Labor Board v. Fruit Pickers*, 377 U.S. 58 at 66 (1964), *citing, Masto Plastics, Corp. v. Labor Board*, 350 U.S. 270, 288.

the statute's construction.[13]

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[13] *North Haven Board of Education v. Bell*, 456 U.S. 512, 526-27 (1982), quoting *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) "(Such statements) 'deserve to be accorded substantial weight.'"

ARGUMENT

III

THE APPROPRIATE MENS REA IN THIS CASE IS THAT SUPPLIED BY THE SPONSOR OF THE LEGISLATION

As previously above indicated Senator Roth in a colloquy agreed with Senator Percy's assumption "that the term "knowingly" in the proposed amendment meant that "the distributor or seller must have either, first, actual knowledge that the materials do contain child pornography depictions or second, circumstances must be such that he should have had such actual knowledge."

This standard seems to be an appropriate one and is consistent with prior Supreme Court interpretations of the degree of knowledge required to satisfy the requirement of scienter or guilty knowledge.

In *Liporata v. United States*, supra. 471 U.S. 419 at Page 434 the Court said:

> "To prove that petitioner knew that his acquisition or possession of food stamps was unauthorized...the government need not show

> that he had knowledge of specific regulations governing food stamp acquisition or possession. Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate Petitioner's state of mind. Rather, as in any other criminal prosecution requiring mens rea, the Government may prove by reference to facts and circumstances surrounding the case that Petitioner knew that his conduct was unauthorized and illegal."

Finally, Amicus brings the case of *United States v. Sheiner*,[14] to the attention of the Court. In that case at Page 982 we find the following:

> "Criminal intent and guilty knowledge essential elements for conviction...need not be established by direct proof; they may be inferred from the statements and conduct of the defendant."

In that same case at Page 983:

> "If the defendants acted willfully and purposely with evil intent, or with a reckless indifference to the truth, they are chargeable with the requisite knowledge and criminal intent.

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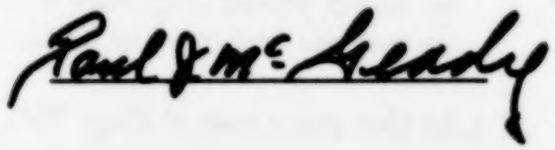
[14] 273 F.Supp. 977 (D.N.Y. 1967) *aff'd.*, 410 F.2d 337 (2d Cir. 1969) *cert denied*, 396 U.S. 825 (1969), 396 U.S. 859 (1969), *sub nom, Piacentile v. United States.*

CONCLUSION

For all of the above reasons, we urge this Honorable Court to interpret the statute as (1) intending a knowledge requirement that the depictions are child pornography (2) which does not necessarily require actual knowledge if circumstances are such that he or she should have had actual knowledge and (3) which knowledge can also be proved by demonstrating a reckless indifference to the truth.

Respectfully submitted,



Paul J. Mc Geady
475 Riverside Drive
New York, New York 10115
Attorney for Amicus Curiae
Morality In Media, Inc.
212-870-3232
(Counsel of Record)

Of Counsel
Robert Peters
Dated: April 5, 1994

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(8)

NO. 93-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, *Petitioner,*

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~

BRIEF OF NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, NATIONAL COALITION AGAINST PORNOGRAPHY, "ENOUGH IS ENOUGH!", NATIONAL COUNCIL OF CATHOLIC WOMEN, FAMILY VIOLENCE & SEXUAL ASSAULT INSTITUTE, NAT'L POLITICAL CONGRESS OF BLACK WOMEN, ALLIANCE FOR THE RIGHTS OF CHILDREN, AMERICAN COALITION FOR ABUSE AWARENESS, CHILDHELP USA, CHILD WELFARE LEAGUE OF AMERICA, FAMILY RESEARCH COUNCIL, FOCUS ON THE FAMILY, JUSTICE FOR CHILDREN, COALITIONS FOR AMERICA, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, FREE CONGRESS RESEARCH & EDUCATION FOUNDATION, SAVE AMERICA'S YOUTH, CITIZENS AGAINST PORNOGRAPHY, CHRISTIAN LEGAL DEFENSE & EDUCATION FOUNDATION, CHRISTIAN LIFE COMMISSION-SOUTHERN BAPTIST CONVENTION, TRADITIONAL VALUES COALITION, CHILD PROTECTION LOBBY, CHILD PROTECTION PROGRAM FOUNDATION, VOICES IN ACTION, "H.U.R.T.", NATIONAL CENTER FOR REDRESS OF INCEST & SEXUAL ABUSE, AS *AMICI CURIAE* URGING REVERSAL.

H. ROBERT SHOWERS* *(Counsel of Record)
CATHLEEN A. CLEAVER
National Law Center for Children and Families
3975 University Drive, Suite 320
Fairfax, Virginia 22030 (703) 691-4626

50 pp

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Comes now the National Law Center for Children and Families ("NLC"), by and through Counsel, and moves this Court to permit it to file a brief *amicus curiae*. This Court issued a Writ of Certiorari on February 18, 1994 in this case. NLC seeks to file a brief *amicus curiae* urging reversal. Sup. Ct. R. 37.3 permits NLC to move this Court for leave to file a brief when a party has not consented to allow it to file.

Solicitor General Drew Days, who represents the government in the present case, has consented to NLC's filing of an *amicus curiae* brief. A copy of this consent has been filed with the clerk of this Court. Mr. Stanley Fleishman, Counsel for the Respondents, has not replied to NLC's request for consent. A copy of this request has also been filed with the clerk of this Court.

NLC represents a diverse coalition of interest groups. *Amici Curiae* in this case represent virtually every segment of the American body politic. Each member of the coalition supporting the attached brief regards the disposition of the present case as crucial to the emotional and physical well-being of children.

Amici Curiae will bring to this Court's attention legal authority and argument not present in the Petition for a Writ of Certiorari.

In view of the foregoing, the National Law Center for Children and Families should be permitted to file an *amicus curiae* brief urging reversal.

Respectfully submitted,

NATIONAL LAW CENTER FOR
CHILDREN AND FAMILIES

H. Robert Showers
(Counsel of Record)

Cathleen A. Cleaver
3975 University Drive, Suite 320
Fairfax, Virginia 22030
(703)-691-4626

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. In view of the government's compelling interest in protecting children from visually recorded sexual abuse, do federal laws proscribing the distribution of child pornography violate the First Amendment where they do not contain a requirement of knowledge of minority status and where lack of such a requirement cannot be shown to impermissibly chill protected expression?

II. In view of the common law tradition of imposing criminal sanctions for the sexual victimization of minors without regard to knowledge of minority status, must knowledge of minority status be read into federal laws proscribing the distribution of child pornography in order that they be consistent with the Fifth Amendment?

III. If knowledge of minority status is present in federal laws proscribing the distribution of child pornography, what level of knowledge is in fact present?

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INTEREST OF THE *AMICI CURIAE*

Amici comprise a broad collection of public interest groups whose membership among others, include the survivors of childhood sexual abuse, pro-family and religious associations and professionals who expend considerable energy advocating legal and social reforms to protect children. *Amici*, while representing diverse political and religious perspectives, agree that this Court's decision in this case will directly affect the safety and well-being of children. For the Court's convenience, the Appendix contains a full description of all *Amici*.

STATEMENT OF THE CASE

This is an appeal from a decision of United States Court of Appeals for the Ninth Circuit. The Ninth Circuit invalidated 18 U.S.C. Section 2252 on its face because Section 2252 did not require that the government prove defendants accused of distributing child pornography have knowledge that the persons depicted therein are less than eighteen years of age. *See* Pet. for Cert. at 15a. The court below reached this result by deciding that the First Amendment requires this knowledge in order to avoid a chilling effect on protected expression which is similar to child pornography. *Id.*

At trial, the government introduced tape recordings of Respondent Gottesman admitting that he knew the videotapes he later transported interstate contained a minor engaging in sexual conduct. Gv't C.A. Excerpts of Record p.54 l.10-19. In fact, Respondent Gottesman offered to locate and distribute other videos containing Traci Lords as a minor engaged in sexual conduct. *Id.* at p.59 l.18-21. The videotapes at issue depict Lords engaging in explicit sexual

acts as young as age 15. Gv't C.A. Excerpts of Record p.40 l.8-10. Tragically, Traci Lords' participation in this illegal market -- a market existing only because people like Gottesman fuel and sustain it -- has left her seriously harmed. *See* S. Somers, *Wednesday's Children* 182 (1992) (Lords incompetent to testify in child pornography trial due to severe trauma).

SUMMARY OF THE ARGUMENT

The Ninth Circuit's interpretation of constitutional precedent fundamentally misapprehends the nature and function of a knowledge requirement derived from the First Amendment. As this Court's obscenity decisions have made clear, the purpose of a First Amendment-inspired knowledge requirement is to ensure that protected expression is not chilled when government criminalizes unprotected expression. Thus, the First Amendment does not require Section 2252 to include elements, such as knowledge of minority status, if their absence would not cause Section 2252 to infringe on First Amendment interests.

In the context of child pornography, the existence *vel non* of knowledge of minority will not infringe on protected expression. This is so because First Amendment precedent dictates that Section 2252 be construed to require that child pornography distributors know of the *sexually explicit character* of the pornographic material they transport interstate. Even in the context of obscenity laws, which are far more indeterminate than Section 2252, this Court has consistently held that the knowledge-of-character requirement adequately protects First Amendment interests.

Moreover, an unbroken tradition of imposing severe criminal sanctions for contributing to the sexual victimization of minors clearly demonstrates that Section 2252 does not offend the Fifth Amendment. At common law, laws prohibiting the sexual exploitation of children

wisely imposed criminal liability without regard to knowledge of the victim's minority status. Fifth Amendment precedent holds that Congress is presumed to have acted consistent with this tradition when it enacted Section 2252.

It is thus fully consistent with the First and Fifth Amendments for Section 2252 to empower the Government to prosecute those members of our society who choose to traffic in pornography which contains children, without shouldering the burden of affirmatively proving their knowledge of minority.

Alternatively, should this Court determine that some knowledge of minority is an element of a Section 2252 offense, precedent indicates that a showing of recklessness is constitutionally sufficient.

LAW AND ARGUMENT

I. 18 U.S.C. SECTION 2252 DOES NOT REQUIRE THAT THE GOVERNMENT PROVE SCIENTER AS TO MINORITY IN A PROSECUTION FOR DISTRIBUTING CHILD PORNOGRAPHY.

A. The Plain Meaning of Section 2252 Does Not Require Knowledge of Minority Status.

Plainly read, Section 2252 does not require knowledge of minority status. Section 2252 reads:

(a) Any person who-

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if-

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct.

In Section 2252, the adverb "knowingly" modifies the verbs "transports" and "ships," the interstate nexus requirement, and the phrase "visual depiction." The phrase "minor engaging in sexual conduct" occurs in an independent clause set off by indentation and in outline format. The independent clause, as written, is thus syntactically and visually distinct from the remainder of Section 2252. *Accord United States v. Kleiner*, 663 F. Supp. 43 (S.D. Fla. 1987); *United States v. Tolczeki*, 614 F. Supp. 1424 (N.D. Ohio 1985).

The Government cites several cases in its Petition and Reply Memorandum which arrive at the opposite construction. *See* Pet. for Cert. at 11 n.5; Reply Memorandum at 1-2. A common flaw permeates these decisions. In each case, the courts *assumed* (or cursorily decided without substantive analysis) that construing Section 2252 without a knowledge requirement for minority status would render the statute unconstitutional. *United States v. Colavito*, 1994 W.L. 76135 (2d Cir. Jan., 24, 1994); *United States v. Cochran*, 1994 W.L. 25599, *2 (3d Cir. Feb., 2, 1994). Accordingly, these courts relied on the well-settled rule that, in order to save a statute, courts should read a knowledge requirement into that statute. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Council*, 485 U.S. 568, 575 (1988). However, as will be demonstrated below, Section 2252 is fully constitutional without knowledge of minority status.

The proper method of analyzing the present case is to first determine whether the Constitution requires knowledge as to minority. If, as this brief demonstrates, such an element is not constitutionally required, *Cochran* and *Colavito* are of no consequence because the assumption, which forms the basis of these decisions, is erroneous and unfounded.[1]

[1] *Amici* are also aware that the First Circuit recently reached the same result as *Cochran* and *Colavito* using the same defective analytical method. *See United States v. Gifford*, 1994 W.L. 46738, *7 (1st Cir. Feb. 24, 1994). Similarly, the *Gifford* decision is of no importance.

Because Section 2252 is fully constitutional without a requirement of knowledge of minority status, a proper analysis of the present case will obviate any need to invalidate an act of Congress or insert, by judicial fiat, a knowledge requirement into a statute which has none.

B. Legislative History Further Demonstrates that Congress Did Not Intend to Include Knowledge of Minority Status as an Element of the Distribution Offense Defined by Section 2252.

The legislative history of Section 2252 supports A*mici*'s conclusion that knowledge as to minority is not an element of a Section 2252 distribution offense. In 1984, Congress amended Section 2252 to accommodate this Court's decision in *Ferber v. New York*, 458 U.S. 747 (1982), which held that government has the power to proscribe non-obscene pornography containing children. *See* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 ("1984 Act"). The legislative history of the 1984 Act does not make reference to the knowledge element of Section 2252.

Thus, it is necessary to examine Congress' intent with respect to knowledge in the original version of Section 2252. *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978)("1977 Act"). Congress' intent in the 1977 Act is clear. The conference committee indicated that Section 2252 was intended to impose criminal liability on any person "who knowingly transport[s], ship[s], or mail[s] for the purpose of sale or distribution ... any such material...." *See* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 95-811, 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 69, 71. The Joint Explanatory Statement of

the Committee of Conference does not indicate that a Section 2252 defendant must have knowledge that the proscribed material contains minors engaging in sexual activity. Furthermore, in a letter to the Senate Judiciary Committee, Assistant Attorney General Wald, now Judge Wald, correctly adduced that "the defendant's knowledge of the age of the child is not an element of the [Section 2252] offense." *See* S. Rep. No. 438, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 64.

It is natural to presume that Congress' intent not to require knowledge as to minority in the original version of Section 2252 carried over into the 1984 Act because the 1984 Act is silent on the question of knowledge.

In light of the legislative history of Section 2252, it is apparent that Section 2252 does not require the government to prove knowledge as to minority status.

II. THE FIRST AMENDMENT DOES NOT REQUIRE THE GOVERNMENT TO PROVE KNOWLEDGE OF THE MINORITY OF PERSONS DEPICTED "ENGAGING IN SEXUAL CONDUCT" IN A PROSECUTION FOR DISTRIBUTING CHILD PORNOGRAPHY UNDER 18 U.S.C. SECTION 2252.

A. Relevant Case Law Reveals that the First Amendment Requires Only General Knowledge of Pornographic Nature, and Does Not Require Knowledge as to the Minority of Children Depicted in Child Pornography.

The present case poses the question whether the Constitution mandates that 18 U.S.C. Section 2252 include an element of knowledge of the minority of children depicted in child pornography. An analysis of relevant precedent reveals that it does not.

On two occasions, this Court has addressed the constitutional propriety of proscriptions against child pornography. *Ferber v. New York*, 458 U.S. 747 (1982)(upholding federal statute proscribing distribution of child pornography); *Osborne v. Ohio*, 495 U.S. 103 (1990)(upholding state statute proscribing simple possession of child pornography). On neither occasion did this Court focus its attention on the question of what the level of knowledge the Constitution requires in the context of child pornography. *See Ferber* 458 U.S. at 765 (some knowledge required); *Osborne*, 495 U.S. at 114 n.9 (recklessness on the part of defendant accused of possessing child pornography is constitutionally sufficient showing of knowledge).

Section 2252 does not create a "pure" strict liability crime. Rather, it requires the government to prove that a distributor of child pornography have knowledge that he is transporting sexually explicit visual material interstate. Consequently, Section 2252 does not violate the *Ferber* Court's admonition that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765.

In *Hamling v. United States*, 418 U.S. 87, 119-24 (1974), this Court concluded that it is constitutionally sufficient to prove that the defendant in an obscenity prosecution knew of the nature and character of the material at issue. That holding is directly applicable here because *Ferber* explicitly incorporated it into the child pornography context. 458 U.S. at 765. What both the Government and Respondents urge on this Court, by agreeing that knowledge of minority status is constitutionally required, is an *additional*, particular knowledge requirement, one to which no decision of this Court has ever alluded. Imposing such a novel and onerous burden on child pornography prosecutions would directly contravene the legislative purpose of Section 2252 -- to protect children from visually recorded sexual abuse -- by inviting deliberate blindness on the part of pornography

distributors and forcing federal prosecutors to prove culpable knowledge despite this deliberate blindness.

By requiring knowledge as to the act of distribution and the pornographic nature of the material distributed, while not requiring knowledge of minority status, Section 2252 appropriately "put[s] pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals." Roscoe Pound, *The Spirit of the Common Law* 52 (1921)(discussing propriety of strict liability statutes); *see also* Oliver Wendell Holmes, *The Common Law* 75 (1881)(strict criminal liability is appropriate because it forces one to "find out at his own peril whether the other facts are present which would make the act criminal"). Moreover, requiring distributors of expressive material to avoid distributing unprotected sexually explicit material is fully consistent with precedent. In *Hamling*, this Court observed:

> The precise course of the line [which every criminal statute draws] may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

418 U.S. at 124 (quoting *United States v. Wurzbach*, 280 U.S. 396, 399 (1930)); *see also Roth v. United States*, 354 U.S. 476, 491-93 (1957).

It is thus entirely consistent with precedent, and legislative purpose, for 18 U.S.C. Section 2252 to impose liability on child pornography distributors without requiring the Government to prove the distributor's knowledge of the minority status of the children depicted.

B. The Absence of a Specific Knowledge Requirement as to Minority Status Does Not Impermissibly Chill Protected Expression.

Contrary to the assertion of the court below, *Smith v. California*, 361 U.S. 147 (1959), does not mandate that Section 2252 require knowledge of minority. Rather, *Smith* and its progeny contribute to a regime of procedural and substantive requirements that this Court has imposed on government efforts to enforce adult obscenity laws. Laws proscribing the dissemination of child pornography, such as 18 U.S.C. Section 2252, have not been subject to similar constraints because they do not affect, in any significant way, the availability of protected expression. *See Osborne*, 495 U.S. at 110; *Ferber*, 458 U.S. at 773.

Smith stands for the proposition that statutes proscribing the distribution of obscenity must contain an element of knowledge. 361 U.S. at 150. In *Smith*, this Court invalidated an ordinance which imposed true strict criminal liability on retailers who distribute obscenity because it "tend[ed] to work a *substantial* restriction on the freedom of speech and of the press." *Id.* (emphasis added). The *Smith* requirement serves to guarantee that constitutionally protected speech will not be chilled when the government exacts criminal punishment for the distribution of obscenity. *See Roaden v. Kentucky*, 413 U.S. 496 (1973); *accord Mishkin v. New York*, 383 U.S. 502, 510 (1966); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968) (per curiam). The government has the right to eliminate obscenity but has no right to employ obscenity laws to censor otherwise protected sexually explicit expression. *Miller v. California*, 413 U.S. 15, 36 (1973). Obscenity -- illegal adult pornography -- constitutes a sub-set of a particular type of expression. Because there is a constitutionally protected "parent" class of adult pornography, government efforts to eliminate obscenity must be limited so as to minimize the

possibility that these efforts will chill protected pornography. Thus, it has been held that all pornography should be presumed to be non-obscene until proven otherwise. *See Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961); *accord Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62 (1989); *New York v. P.J. Video*, Inc., 475 U.S. 868, 873 (1986).

The Court in *Smith* simply sought to protect non-obscene pornography by forbidding true strict liability for the distribution of obscenity. In the face of criminal liability without fault for the distribution of obscenity, responsible retailers would, as a practical matter, be compelled to presume that all sexually oriented material could be unprotected obscenity and refrain from offering any sexually oriented material for sale. *Smith* was intended to avoid such an unfair result for the innocent and unknowing.

18 U.S.C. Section 2252, on the other hand, proscribes only pornographic materials containing children engaging in sexual conduct and is silent on the question of obscenity. In *Ferber*, this Court recognized that there is no constitutional right to produce or distribute pornography containing minors. 458 U.S. at 756. This Court has also recognized that government has more freedom to proscribe child pornography than to regulate obscenity. *Compare Osborne*, 495 U.S. at 111 (government may ban mere possession of child pornography) *with Stanley v. Georgia*, 394 U.S. 557, 564-68 (1969) (government may not ban mere possession of obscenity). Moreover, this Court has never held that sexually explicit expression containing minors is presumptively protected by the First Amendment. This is so because the government's interest in eliminating child pornography is more urgently compelling than the government's interests in proscribing obscenity. *See, e.g., American Library Ass'n. v. Barr*, 956 F.2d 1178, 1181 (D.C. Cir. 1992) (interest in eliminating child pornography more important than interest in regulating obscenity).

Because there is no class of sexually explicit material containing visual depictions of minors engaging in sexual conduct that is protected by the First Amendment, the threat to protected speech that gave rise to the result in *Smith* is not present under 18 U.S.C. Section 2252. That is, the constitutional tension between a "parent" class of protected expression and a "sub-class" of unprotected expressive material is not present in the context of child pornography as it is in the obscenity context. Furthermore, the test for child pornography set forth in Section 2252 is objective and precise when compared to the test for obscenity. *Compare Mishkin*, 383 U.S. at 510 (describing obscenity doctrine as somewhat ambiguous) *with Ferber*, 458 U.S. at 764 (government need not prove prurient appeal or redeeming value); *see United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987)(federal child pornography standard not unconstitutionally vague). Because of this, responsible retailers can readily ascertain whether sexually explicit merchandise is unprotected child pornography. *See Mishkin*, 383 U.S. at 511 ("[t]he Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material *and to compensate for the ambiguities inherent in the definition of obscenity*")(emphasis added).[2] Proscribing pornography containing minors therefore runs no significant risk of restraining constitutionally protected speech. *Compare Freedman v. Maryland*, 380 U.S. 51, 59-60 (1965)(purpose

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[2] In fact, this Court has not required blind adherence to the *Smith* decision. In *People v. Kirkpatrick*, 343 N.Y.S.2d 70, *appeal dismissed for want of a substantial federal question*, 414 U.S. 948 (1973), this Court let stand an obscenity statute which provided for a rebuttable presumption of knowledge once the fact of possession had been proven. Thus, even in the obscenity context, where the risk of chilling protected speech is far greater, this Court has permitted legislatures to apportion responsibility creatively. As with the statute in *Kirkpatrick*, Section 2252 does nothing more than require pornography distributors to shoulder the burden of ensuring that they do not engage in criminal conduct.

of presumption of non-obscenity to avoid prior restraints) *with Ferber*, 458 U.S. at 773 (laws proscribing child pornography unlikely to significantly restrain protected expression).

Accordingly, Section 2252 does not restrain protected expression in any significant way. Adult pornography is virtually unaffected by Section 2252. Likewise, Section 2252 does not affect visual depictions of children unless the depiction contains children engaging in explicit sexual conduct. Indeed, the only sort of expressive material which could conceivably be affected by Section 2252 as properly construed would be visual depictions of youthful-looking adults dressed like minors (so-called "simulated or pseudo-kiddie porn") engaged in explicit sexual conduct. Given the absence of substantial value in such expression (*see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (describing protected adult pornography as possessing slight social value)), and its demonstrated link to the sexual victimization of children (*see Osborne*, 495 U.S. at 111 n. 7), imposing liability on distributors of child pornography without requiring affirmative proof of their knowledge of minority status is, without a doubt, constitutionally appropriate.[3] Section 2252 advances the government's compelling interest in preventing "[the] sexual exploitation and abuse of children." *Ferber*, 458 U.S. at 757; *see* Janet

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[3] This Court could, under appropriate circumstances, engraft a good faith defense onto Section 2252 whereby pornography distributors would escape criminal liability. However, the present case does not present the appropriate vehicle to do this as Respondent Gottesman actually knew that the videotapes he distributed contained a minor engaged in sexual conduct. *See* Gv't C.A. Excerpts of Record p. 54; *see generally* Laurie Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401 (1993); *cf. United States v. United States District Court of the Central District of Calif.*, 858 F.2d 534 (9th Cir. 1988) (while knowledge of the performers minority status is *not* an element of a child pornography production case, it can be an affirmative defense.)

Reno & James Smart, *Dealing with Child Abuse and Neglect: a Prosecutor's Viewpoint*, 8 Nova L. Rev. 271, 274-75 (1984)(child sexual abuse necessitates legal intervention). As this Court has recognized, the distribution of child pornography contributes to child sexual abuse by fostering a market for pornographic depictions of child abuse that will likely be used to seduce other children into harmful sexual activity. *Osborne*, 495 U.S. at 111 & n.7. Section 2252 reduces the availability of this unprotected material by forcing distributors of pornography to monitor the material they sell.

III. THE FIFTH AMENDMENT DOES NOT REQUIRE THE GOVERNMENT TO PROVE KNOWLEDGE OF THE MINORITY STATUS OF CHILDREN DEPICTED "ENGAGING IN SEXUAL CONDUCT" IN A PROSECUTION FOR DISTRIBUTING CHILD PORNOGRAPHY UNDER 18 U.S.C. SECTION 2252.

A. Section 2252 Must be Construed Consistent with the Common Law.

1. Where a Criminal Statute Fails to Specify Knowledge, Courts Should Presume that Knowledge is Not Required if Analogous Common Law Crimes Did Not Require Knowledge.

In *Morissette v. United States*, 342 U.S. 246, 263 (1952), this Court held that Congress is presumed to incorporate the common law when it enacts a criminal statute that does not

explicitly provide for knowledge.[4] *Morissette* observed that the general rule at common law was to require knowledge as to each element of a crime. 342 U.S. at 251. However, *Morissette* went on to state explicitly that the common law recognized an exception (*i.e.*, an instance where knowledge was not required) to the general rule in the case of "sex offenses, such as rape, *in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached the age of consent.*" *Id.* at 251 n.8. (emphasis added). Because there was no precise analog to Section 2252 at common law, it is this tradition against which Section 2252 must be measured for Fifth Amendment purposes. *Cf. United States v. Brooks*, 841 F.2d 268, 270 (9th Cir.), *cert. denied*, 487 U.S. 1227 (1988).

This Court's subsequent treatment of the *Morissette* doctrine has reinforced the importance of construing modern criminal statutes consistent with their common law analogs and progenitors. In *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978), for instance, *Morissette* was relied on for the proposition that, where Congress fails to specify knowledge and the common law analog provided for knowledge, courts should read a knowledge requirement into the statute. *Accord Liparota v. United States*, 471 U.S. 419, 424-25 (1985). A necessary corollary to this is that where, as with Section 2252, the common law analog permitted strict

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4 Broadly speaking, the phrase "common law" denotes the body of legal authority which forms the basis of our legal system. *See* Black's Law Dictionary 276 (6th Ed. 1990). Thus, the phrase is not limited solely to case law or a particular historical period. *See United States v. Brooks*, 841 F.2d 268, 269 (9th Cir.), *cert. denied*, 487 U.S. 1227 (1988). The Court in *Morissette* recognized this when it classified so-called "statutory rape" as of common law origin. 342 U.S. 251 n.8. In fact, "statutory rape" was originally a creature of statutory enactment but has become a part of the common law as courts have interpreted and applied various statutes. *See, e.g., Commonwealth v. Miller*, 432 N.E.2d 463, 465 (Mass. 1982) (identifying 3 Edw. I, Stat., Westmin. I, c. 13 (1275) as original source for "statutory rape" offense).

criminal liability and Congress has failed to specify knowledge, courts should not read knowledge into the statute. *See Brooks*, 841 F.2d at 270.

In *United States v. Freed*, 401 U.S. 601, 609 (1971), this Court imposed strict criminal liability for the possession of unregistered hand grenades. This result was predicated on the common-sense observation that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* In other words, this result obtained in *Freed* because the act at issue was one which any reasonable person would know was impermissible and subject to some form of criminal proscription. Similarly, in the present case, Respondent Gottesman cannot credibly contend that knowledge of minority is necessary to ensure that he not be caught unaware or that Section 2252 would otherwise penalize innocent conduct. As with hand grenades, Respondent Gottesman could hardly be surprised to learn that the distribution of pornography depicting a minor engaged in the most explicit forms of sexual activity is not an innocent act.

2. At Common Law, Criminal Prohibitions Intended to Protect Children from Sexual Victimization Did Not Require Knowledge of Minority Status.

The common law approach to crimes intended to protect children from sexual victimization clearly demonstrates that a requirement of knowledge as to minority status ought not to be read into Section 2252. *See Morissette*, 342 U.S. at 251 n.8, *Liparota*, 471 U.S. at 427. The common law imposed pure strict liability on persons who sexually victimized children. *See, e.g., R. v. Prince*, L.R. 2 Cr.Cas.Res. 154 (1875), *reprinted in* [1874-80] All E.R.Rep. 881 (Bramwell, B.) In *Prince*, the House of Lords upheld a conviction for abducting a minor female with the intention of corrupting

her. *Id.*, at 885. The defendant in that case clearly established that he reasonably believed the girl to be of the age of majority. *Id.*; *see* Peter Brett, An Inquiry into Criminal Guilt 148-49 (1963) (identifying the defendant's conduct in *Prince* as immoral according to nineteenth century mores). The *Prince* court reasoned that culpable knowledge was irrelevant in this circumstance because abducting a minor female for immoral purposes was "wrong in itself." *Prince* at 884.

The *Prince* decision raises two points important to the present case. First, participating in the sexual victimization of a child is sufficiently beyond the pale that the common law considered the imposition of absolute liability to be justified. Surely the same holds true today, especially when the child victim has been as severely traumatized as Traci Lords. *See*, *Somers*, *supra* at 183 (Traci Lords describing herself "a drugged young girl who didn't care, who wanted to die, and that [performing in X-rated films] was my form of suicide"). Second, absolute liability shifts responsibility to adults to take great care not to participate in the sexual corruption of a child, even if the child appears to consent. Minors, then as now, are conclusively presumed to be incapable of informed consent so that salacious adults cannot victimize them. *See generally, Commonwealth v. Miller*, 432 N.E.2d 463 (Mass. 1982).

The *Prince* decision is also significant because a number of state courts in this country adopted it as the definitive statement on the common law regarding protecting children form sexual victimization. *See, e.g., Commonwealth v. Murphy*, 165 Mass. 66, 70 (1896); *Edens v. State*, 43 S.W. 89 (Tex. Crim. App. 1897); *Miller v. State*, 79 So. 314 (Ala. Ct. App. 1918);[5] *see also State v. Newton*, 44 Iowa 45 (1876)

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[5] In *People v. Ratz*, 115 Cal. 132 (1896), California also incorporated *Prince*. In *People v. Hernandez*, 393 P.2d 673 (Cal. 1964), the California Supreme Court altered *Ratz* by creating a reasonable mistake of age defense. This does not affect the strict liability character of "statutory rape" in California.

(reaching same conclusion without citing to *Prince*.) Thus, it has always been recognized that strict criminal liability represents an appropriate way of preventing the sexual corruption of minors.

3. At Common Law, Criminal Prohibitions Intended to Safeguard Children's Moral and Psychological Development Did Not Require Knowledge of Minority Status.

The common law also imposed strict criminal liability to protect children in related contexts. For instance, by 1885, twelve states imposed strict criminal liability for the sale of liquor to minors. *See, e.g., Redmond v. State*, 36 Ark. 58 (1880); *State v. Kinkead*, 17 A. 855 (Conn. 1889); *State v. McCutheon*, 69 Ill. 601 (1873); *State v. Clottu*, 33 Ind. 409 (1870); *Jamison v. Burton*, 43 Iowa 282 (1876); *Ulrich v. Commissioner*, 69 Ky. 400 (1869); *Carroll v. State*, 3 A. 29 (Md. 1885); *Commonwealth v. Finnegan*, 124 Mass. 324 (1878); *State v. Bruder*, 35 Mo. App. 475 (1880); *Perry v. Edwards*, 44 N.Y. 223 (1871); *State v. Cain*, 9 W. Va. 559 (1876); *State v. Hartfiel*, 24 Wis. 60 (1869). In each of these cases, courts did not require the government to show knowledge of minority status on the part of the defendant. The government only had to prove that the minor to whom the liquor was sold was in fact underage.

B. Other Modern Criminal Statutes Intended to Protect Children Do Not Require Knowledge of Minority Status.

The practice of not requiring knowledge of minority status has continued to the present day. In *United States v.*

Chin, 981 F.2d 1275, 1280 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 2377 (1993), the court held that knowledge of minority status was not constitutionally required in a prosecution for using a minor to conceal drug-related activities. Judge Ginsburg, writing for a unanimous panel, concluded that laws intended to protect children should not be construed "to invite blindness...to the age of youths." *Id.*, at 1280 (relying on *United States v. Curry*, 902 F.2d 912, 915-16 (11th Cir.), *cert. denied*, 498 U.S. 1015 (1990)). Significantly, Judge Ginsburg reached this result by relying on precedent which held that knowledge of minority status was not required when the involvement of minors in illegal activities merely gave rise to enhanced penalties. *Id.*, at 1280. In other words, Judge Ginsburg refused to require knowledge of minority status notwithstanding the fact the minority was a substantive element of the criminal statute at issue.

The *Chin* court relied on *United States v. Pruitt*, 763 F.2d 1256, 1261-62 (11th Cir. 1985), *cert. denied*, 474 U.S. 1084 (1986). *Pruitt* declared that a federal law prohibiting the distribution of narcotics to persons under twenty-one years of age did not contain a requirement of knowledge of minority status. *Id.* at 1262 Similarly, in *United States v. Hamilton*, 456 F.2d 171, 172-73 (3d Cir.), *cert. denied*, 406 U.S. 947 (1972), the court held that knowledge of minority status was not required in order to mete out enhanced penalties for transporting minors interstate for immoral purposes under 18 U.S.C. Section 2423. These decisions make it clear that criminal statutes may constitutionally dispense with knowledge of minority status if the statute's purpose is to protect children and doing so furthers that purpose.

Against this backdrop, it is clear that Section 2252 does not, and need not, contain knowledge of minority status. First, the common law tradition of protecting children by imposing criminal sanctions without regard to knowledge of minority status is directly applicable. The manifest purpose

of Section 2252 was to protect children. *See* S. Rep. No. 95-438, *reprinted in* 1978 U.S.C.C.A.N. 40, 43-45. Neither the plain language nor the legislative history of Section 2252 suggest that it contains a requirement of knowledge of minority status. Second, contemporary criminal statutes with very similar purposes have been construed as not requiring knowledge of minority status. Thus, both historical and contemporary precedent reveal that Section 2252 contains no requirement of knowledge as to minority and that Section 2252, so construed, is fully consistent with the Fifth Amendment.

IV. IF THIS COURT DETERMINES THAT KNOWLEDGE OF MINORITY STATUS IS PRESENT IN SECTION 2252, A SHOWING OF RECKLESSNESS IS CONSTITUTIONALLY SUFFICIENT.

In the event that this Court should determine that some knowledge is present in Section 2252, precedent requires only that a Section 2252 defendant be reckless concerning the fact of minority status. *See Hamling*, 418 U.S. at 119-24; *Mishkin*, 383 U.S. at 510-11; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

In *Osborne*, this Court has in fact held that, in the context of child pornography, recklessness is a constitutionally sufficient level of knowledge. 495 U.S. at 115. *Osborne* is directly applicable to the present case. By imposing criminal sanctions on distributors who disregard a substantial risk that they are trafficking in child pornography, Section 2252 will compel distributors to take due care to ensure that the sexually explicit material they are distributing does not contain children. [6]

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[6] In its Petition, the Government erroneously asserts that there is no meaningful difference between an actual knowledge standard and a recklessness standard. *See* Pet. for Cert. at 11 n.4. This is patently

Furthermore, *Osborne* strongly indicates that the *Hamling* and *Mishkin* line of authority permitting proof of culpable knowledge through indirect and circumstantial evidence should be applied to Section 2252. *See Hamling* 418 U.S. at 121-22 (upholding obscenity conviction based on circumstantial evidence of knowledge); *Ginsberg v. New York*, 390 U.S. 629, 643-644 (1968) (same). The Court in *Mishkin* rejected the assertion of a defendant convicted of distributing obscene matter that there was insufficient proof of knowledge. 383 U.S. at 511. The *Mishkin* Court held that sufficient evidence of culpable knowledge had been introduced because the defendant had engaged in activities indicative of knowledge. *Id.* The same should be true in the context of Section 2252.

Section 2252 only imposes criminal sanctions against distributors who know of the explicit sexual nature and character of the material they distribute. In these circumstances, it is reasonable to expect the distributor to inspect the material to ascertain to whether it contains underage participants. Failure to so inspect is a reckless act.

In fact, in almost every case involving child pornography distribution, the circumstances surrounding the sale, transfer or receipt would put any reasonable person on notice that a minor is depicted in the pornography. For example, titles of video tapes or magazines such as "Lolitas" are obvious indicators. Advertisements for "young love" or "hot teenage sex," the text accompanying visual depictions and the pictures themselves are strong evidence that underage performers are involved. The market for child pornography demands that producers and promoters disclose the age of children involved and type of sex acts depicted. Pedophiles,

---

incorrect. Permitting Section 2252 liability for disregarding a substantial risk (i.e., recklessness) is far more consistent with the purpose of Section 2252 than requiring proof of actual knowledge of minority as a *sine qua non* to criminal liability.

those who have a sexual interest in children, and molesters want to use the material to seduce children into sexual activity and will selectively purchase pornography involving children. Moreover, the price of child pornography will be much higher than for adult pornography and its delivery much more clandestine.

In short, the circumstances surrounding the distribution or receipt of child pornography will make it obvious to the purchaser, or distributor, that they are trafficking pornography involving children.

Given the ready availability of information which would put one on notice that pornography might contain children, recklessness is the appropriate level of knowledge to read into Section 2252. On the other hand, reading an actual knowledge standard into Section 2252 would be disastrous because the type of information available to pornography distributors imparts primarily constructive knowledge. An actual knowledge standard would have the untoward consequence of exonerating pornography distributors who have reason to know that their merchandise contains underage performers if the government cannot prove they were actually aware of this fact.

CONCLUSION

The decision of the Court below should be reversed and the present case should be remanded for reconsideration in light of Section 2252 as not requiring knowledge of minority status.

Respectfully submitted,

NATIONAL LAW CENTER FOR
CHILDREN AND FAMILIES

H. Robert Showers*
*(Counsel of Record)

Cathleen A. Cleaver
3975 University Drive, Suite 320
Fairfax, Virginia 22030
(703)-691-4626

APPENDIX

INTEREST AND DESCRIPTION OF THE AMICI

The **National Law Center for Children and Families** ("National Law Center"), based in the Washington metropolitan area, is a non-profit legal organization dedicated to the protection of children and the preservation of families through the enforcement of existing laws across the nation and the promulgation of new legislation against illegal pornography and sexual exploitation.

Through its legal staff, resource library, and publications, the National Law Center actively participates in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop illegal pornography and its concomitant harms of sexual exploitation of children, women, and families.

National Law Center attorneys assist many county, city and civic leaders around the nation in drafting and enacting new legislation concerning obscenity, child pornography, and materials which is harmful to minors. The National Law Center also disseminates information to legislators, law enforcers, public officials, and concerned citizens on pornography, its effects, and the laws which regulate it.

The National Law Center is dedicated to equipping law enforcement personnel with the background information, pleadings, and legal techniques necessary to win the war for our children and families. Presently, the National Law Center is involved in publishing training materials and reference manuals on child sexual exploitation and obscenity. Its legal staff has conducted legal and law enforcement training for thousands of investigators and prosecutors since 1984.

The National Law Center has submitted numerous briefs to this Court in *Osborne v. Ohio, Alexander v. United States*, *Jacobson v. United States* and *Knox v. United States.*

The **National Coalition Against Pornography** ("N-CAP") was founded in 1983 by Dr. Jerry R. Kirk to respond to the devastating impact of illegal obscenity and child pornography on America. N-CAP holds that these materials have a direct relationship to the skyrocketing incidence of rape, sexual violence and child molestation in the United States. Numerous respected studies confirm this opinion.

With members representing over 50 religious groups, denominations, citizen action groups and foundations, N-CAP works to increase public awareness of the harm caused by obscenity, indecency and child pornography and to implement a number of programs designed to minimize the threat they pose to our society.

These programs include educational/training seminars designed to teach citizens and law enforcement officials how to rid their communities of illegal obscenity and child pornography. Other programs include: victim service development training; legal and law enforcement training on obscenity and child pornography investigations and prosecutions; extensive resource development and distribution, including a wide range of research reports documenting the harm of obscenity, indecency and child pornography; expert testimony for federal and state legislatures that are considering stronger obscenity and child protection laws. N-CAP founder, Dr. Jerry Kirk, provided testimony before both the U.S. House of Representative and the U.S. Senate in support of the Child Protection and Obscenity Enforcement Act of 1988.

Each of N-CAP's programs is active on a national basis, with specific involvement in dozens of local cities at any given time. The fundamental mission and purpose of N-CAP

is in protecting children through the elimination of child pornography and obscenity, and the restriction of indecency.

The **"Enough is Enough!"** campaign's mission is to greatly reduce sexual violence and to prevent children, women, men and families from becoming victims by eliminating child pornography and removing hard-core and illegal pornography from the marketplace.

This is an educational program with a plan to mobilize America's women in the battle against the abusive, predatory material that is flooding our nation. Pornography leaves in its wake broken lives and homes, as its chain of abuse victimizes women and their children.

The "Enough is Enough!" campaign includes women from varied backgrounds, professions, religions, non-profit organizations and political affiliations. This is a campaign with a focused target (that which is illegal), and a diverse, growing constituency. It is a unique effort in that moderate, liberal and conservative women are joining together to deal with hate literature which eroticizes inequality and violence, preys upon children and holds a fatal attraction for many men.

Over 30% of the states' First Ladies and numerous other women of influence have become members of the National Committee of Support, and this list is expanding.

The national launch of the "Enough is Enough!" campaign was held November 1992. Since that date, educational meetings and training seminars have been held in cities from coast to coast. This campaign is not creating a new organization, rather, initiating a movement. Local action is on the increase as women are empowered to bring about change. They are encouraged, educated and provided with materials

to equip them to succeed in their efforts. Women are investing their influence to change the way America thinks about pornography.

The **National Center for Missing and Exploited Children** (the "Center") is a non–profit, tax–exempt corporation chartered in the District of Columbia in 1984, with goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children. The Center works in cooperation with the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice in coordinating the efforts of law enforcement, social service agencies, elected officials, judges, prosecutors, educators, and the public and private sectors on child protection issues.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement tasks under 42 U.S.C. §§5771–5777, including operation of the national toll–free hotline for reports of missing children; operation of the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and assistance to OJJDP in performing its task of coordinating federally funded programs related to missing children. The Center actively assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service, U.S. Postal Inspectors Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, state missing children clearing-

house, non–profit organizations, and interested child advocates, and training to professionals.

The **Child Welfare League of America** ("CWLA") is a federation of more than 700 child welfare agencies in the public and voluntary sectors. CWLA is almost three-quarters of a century old and has long been involved in the development of quality program, practice and policy in the field of child welfare, including child protective services. CWLA standards for quality practice address services to abused and neglected children, including children who have been sexually abused. CWLA standards expressly recognize that child sexual abuse includes the exploitation of children and child pornography. CWLA is committed to strong legal protections to ensure that children are not abused through pornographic exploitation and that children are not placed at heightened risk of sexual abuse and victimization by pedophiles as a result of child pornography.

The **National Council of Catholic Women** is a nationwide federation of 8000 Catholic women's organizations representing millions of Catholic women. NCCW acts through its affiliated organizations to support, empower and educate all Catholic women in spirituality, leadership and service. NCCW programs respond with Gospel values to the needs of the Church and society in the modern world.

Childhelp USA has come to the aid of children in distress since 1959. Childhelp is committed to fighting child abuse and neglect with research, treatment, and prevention programs. We operate the National Child Abuse Hotline (1-800-4-A-CHILD and 1-800-2-A-CHILD for the hearing impaired with TDD equipment), America's only 50-state, 24-hour, toll-free crisis intervention program. The Hotline is staffed by trained counselors with a masters degree or higher

and has a data bank of over 60,000 service providers across the country. Childhelp also operates two residential treatment facilities for the most severely physically and sexually abused children ages 2 through 12, one in southern California, and one in central Virginia, and recently initiated programs in Knoxville, Tennessee. Our services include therapeutic foster homes, Head Start programs, group programs for teen and adult survivors of abuse, training programs for child care workers and foster parents, and education and advocacy initiatives.

The **American Coalition for Abuse Awareness** ("ACAA") is an ad hoc coalition of individuals and groups committed to resolving the issue of sexual abuse of children. The ACAA has been founded to seek enactment of federal and state legislation establishing the right of a child to be free from sexual victimization, and appropriate protections to assure that such victimization does not occur; enactment of federal and state legislation extending or eliminating statutes of limitations relating to civil lawsuits brought by adult survivors of childhood sexual abuse; formation of a broad based Coalition to support such legislation; development of public and media awareness of the issue of sexual abuse of children; establishment of a comprehensive network of legal professionals nationwide dedicated to advancing the legal rights of victims of childhood sexual abuse through the justice system; development of educational outreach programs for members of the judicial and legislative branches of government; establishment of a national body to make policy recommendations on issues related to childhood sexual abuse, protection of children, and adult survivors of abuse.

Focus on the Family is a Christian, non–profit organization committed to strengthening the emotional, psychological and spiritual health of children and their families in the United States and throughout the world. Focus on the

Family's President, Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Focus on the Family has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book *Pornography: A Human Tragedy* which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Focus on the Family daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1400 stations. Its monthly magazine has a circulation of 1.85 million. Focus on the Family regularly receives letters and telephone calls from and counsels with families who have children devastated by pornography, molestation and abuse.

Focus on the Family works to preserve and protect the family, and thus has particular knowledge about the impact of child pornography that will be helpful to the Court in this case.

The **Family Violence & Sexual Assault Institute** ("FVSAI") was established in 1984 by Robert Geffner, Ph.D. The FVSAI became an independent, nonprofit corporation (501[c][3]) in 1991. The first Family Violence bulletin (FVB), now the Family Violence & Sexual Assault Bulletin (FVSAB), was published in 1985. The FVSAI is a national resource center and maintains an international clearinghouse of references and unpublished papers concerning aspects of family violence and sexual abuse, reviews information and materials, and then disseminates the information in the FVSAB, which is published quarterly and distributed internationally. The overall purposes of these two components of the FVSAI is to improve networking among

researchers, practitioners, and agencies, and to disseminate information.

In addition, the FVSAI, in cooperation with crisis centers, agencies, and counseling clinics, is involved in developing treatment programs for spouse/partner abuse and sexual abuse. We have also published two treatment manuals and four bibliographies, and are working on others. The focus of our program's research has been on victims and offenders of spouse/partner abuse and of incest.

The final components of the FVSAI involve training and consultation. We conduct seminars and workshops nationwide, as well as educational programs and conferences. We also serve as consultants to various organizations and agencies, providing program evaluation, research, and technical assistance.

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues which affect American families. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harms of child pornography that will be helpful to the Court in this case.

The **National Center for Redress of Incest and Sexual Abuse** ("Center for Redress") is a foundation established to

address the legal needs of adult survivors and child victims of sexual abuse. Located in Washington, D.C., its purpose is to build a comprehensive network of attorneys across the country who are dedicated to furthering the rights of survivors under the law; to develop educational outreach programs, focusing on members of the judicial and legislative branches of government; to facilitate a national grassroots effort to support projects in progress on the issue of sexual abuse and incest; and to litigate test cases under civil law related to childhood sexual victimization. The Center for Redress believes that the connection between childhood sexual abuse and child pornography has been established beyond doubt, and supports the enforcement of laws aimed at preventing the production and distribution of child pornography, such as the law at issue in this case.

The **National Political Congress of Black Women** was founded in 1984 to empower African American women and their families, socially, politically, and economically.

We have recently launched a crusade to ban "Gangsta Rap" which promotes and glorifies violence, drugs, and explicit sex. Much of this pornographic rap also defames and denigrates women. Fifty percent of "Gangsta Rap" is sold to minors under the age of 17 of which half are between the ages of 10 to 14.

We are pleased to join the National Law Center as *amici curiae* in support of reversal of the lower court's decision.

Help Us Regain The Children, a national legal research center and lobbying entity, has inspired both state and federal legislative investigations and hearings on the sexual abuse and exploitation of children caught in the family court and child protective system. Child advocates, legal experts, mental health professionals and parents of sexually abused

children have been brought by our center to the attention of the legislature for the purpose of building an impressive record, detailing the severity of malfunctioning of our courts and social agencies in their role to protect children from predatory harm.

One of the pivotal reasons for the devastating collapse of our esteemed governmental bodies to shield innocent children from their perpetrators is the high level of debauchery and prurience suffusing society. This pestilence is a direct result of the saturation of our country with child pornographic material that commands prodigious profits as an expanding and metastatic industry. We are resolutely convinced that adding the extra burden of scienter as to minority is not only outside of the 1977 law, the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. Sec. 2252, but it unfairly narrows the definition of the crimes of child pornography to the point where perpetrators will be granted license to commit these heinous crimes with relative impunity.

VOICES In Action, Inc. is an international organization of survivors and supporters of survivors of incest and child sexual abuse that is dedicated, among other things, to the prevention of incest and child sexual abuse in our society. VOICES is a nonprofit organization headquartered in Chicago, and is the largest membership organization of incest and child sexual abuse survivors in the United States. VOICES' members believe that child sexual abuse is not limited to intercourse, but includes other forms of sexual violation, such as voyeurism, pornography or exhibitionism.

VOICES is strongly committed to ending the traffic of child pornography in all its forms. VOICES therefore urges in the strongest possible terms that this Court reverse the lower court.

The **Free Congress Research & Education Foundation** is a non-profit , non-partisan public policy research institute founded in 1978. Its priorities include the separation of powers, judicial restraint, and traditional family and social values. Amicus believes this case directly implicates all three of these fundamental concerns. The separation of powers means that Congress enacts statutes like the one in this case and the Department of Justice is to enforce, rather than re-write, those statutes. Judicial restraint requires fidelity to the statutory meaning intended by Congress over that preferred by the Department of Justice. Traditional values means protecting children from abuse, as Congress sought to do in this statute.

Coalitions for America is a non-profit lobbying organization whose priorities include the protection of children from abuse. To that end, amicus seeks to promote protective, yet constitutionally permissible, legislation. Amicus urges this court to apply traditional rules of statutory construction to preserve the intended meaning of the statute at issue.

Save America's Youth , Inc., is a non-profit educational and advocacy organization concerned with the problems facing young people in America today. Amicus is affiliated with Freedom Village, USA, a successful long-term rehabilitation facility for troubled teenagers. Through that association, amicus knows first-hand the permanent and tragic effects of child abuse, including the sexual abuse that is child pornography. *Amicus* believes the statute at issue in this case can help combat this evil only if the protective legislative intent behind it is upheld.

Citizens Against Pornography is a non-profit organization with the purpose of educating and informing the

public about the harmful effects of pornography, and promoting and encouraging enforcement and prosecution of obscenity and child pornography laws.

We believe that pornography is not a victimless crime. The dehumanization, assault on human dignity, and violence that is promoted through pornography destroys the very fabric of society.

Our belief is that our children are our greatest natural resource and we must do everything to protect them from being exploited and abused. Child pornography is a most heinous crime. The 1984 Child Protection Act has been used for the past ten years to successfully prosecute pornographers. The intent and purpose of the Act must not be discarded because of a political agenda. Our children's lives and innocence must be protected.

Because both the Justice Department and the Respondents have betrayed and endangered our children, we wish to be on record stating our interest and support for this brief.

Christian Legal Defense and Education Foundation is a non-profit organization that represents churches and individuals across the nation. CLD provides legal counsel, Washington representation, and researching services to their supporters. The organization has filed many amicus briefs in the past in cases that directly address a concern that Christians share across America share. Most recently CLD filed a brief before the Supreme Court in *Alexander v. U.S.* a case where it was determined that the RICO laws could be used against pornographers.

The *United States v. X-Citement Video* case is of particular interest to CLD because it deals with pornography,

children and the weakening of a long-standing statute. Christians in America want to protect children and punish those who deal wickedly with them. Our supporting churches have pledged their prayers, time, and money to battle the reinterpretation of the federal Child Protection Act. On behalf of all of our supporters, CLD asks this court to maintain their previous position in this case and let the correct interpretation of the statute stand as it has for the last nine years.

The **Christian Life Commission/Southern Baptist Convention** is the nation's largest Protestant denomination, with over 15.4 million members in nearly 38,400 local churches. The Christian Life Commission is the public policy agency of the Convention, assigned to address moral and ethical issues, including the issue of pornography and obscenity. Amicus produces publications and seminars to educate Southern Baptist about public policy issues, to encourage responsible Christian citizenship as well as personal biblical decision-making in daily Christian life. Amicus also seeks to bring biblical principles and Southern Baptist convictions to bear before courts, legislatures and policy making bodies. *Amicus* frequently files briefs as *amicus curiae* in cases important to family and morality, such as this case.

Traditional Values Coalition ("TVC") is a grassroots lobby and education group representing more than 31,000 churches nationally. TVC is used as a resource on public policy issues for its member churches. The churches serve as a resource to the community with various ministries to people grappling with pornography addiction and victims of pornography-related sexual abuse.

Traditional Values Coalition has taken a leadership role on issues relating to pornography since 1985. TVC monitors,

evaluates and affects legislation, court actions, and cultural trends to take an informed and aggressive stand against pornography. TVC actively lobbied Congress in support of the Pornography Victims Compensation Act of 1991.

In the California legislature TVC successfully lobbied for a bill that instituted most of the Miller Standard for the state of California, allowing the state to maintain a standard of decency by which all works of pornography are judged. TVC has also promoted other anti-pornography bills including, the News Rack Bill (prohibiting the sale of pornography in vending machines except in adult only areas), the Dial-A-Porn Bill (preventing children from accessing phone pornography without a credit card) and a bill that would make it a crime for parents to expose their children to pornographic material.

TVC's founder and chairman, Rev. Louis P. Sheldon, has held and addressed Minister's Conferences on the impact of pornography on America's culture. Rev. Sheldon has also debated the issue on numerous television and radio programs.

TVC is headquartered in Anaheim, California, and maintains a Washington, D.C. government affairs and media office on Capitol Hill, as well as several regional offices around the country.

Justice for Children ("JFC") is a national child advocacy organization headquartered in Houston, Texas. JFC works for the child who is abused, abandoned, neglected or simply lost in the child welfare, family court, and/or criminal justice systems. Unlike other child advocacy organizations which have been formed to prevent child abuse through education and social programs, JFC focuses on protecting the abused child once an initial report has been

made to the authorities. We work and speak for those who are too young or too frightened to speak for themselves.

Alliance for the Rights of Children ("ARCH"), a national alliance of children's rights advocacy organizations, respectfully urges the U.S. Supreme Court to grant certiorari on the above case on the issue of whether the first amendment requires that the government prove scienter as to the minority of "pornographic actors and actresses" in a prosecution for distributing child pornography under 18 U.S.C. Sec. 2252.

This *amicus* brief eloquently supports the position that child pornography is by definition obscene and its purveyors should have no defense. Alliance for the Rights of Children is working nationwide with thousands of organizations and individuals who are concerned over the rising reports of child molestation and the failure of the legal system to protect the victims. Child pornography is a multi-billion dollar international business that promotes and perpetuates sex crimes against children.

ARCH strongly supports the arguments in this brief.

Child Protection Lobby, Inc. is a California non-profit 501(c)(4) corporation based in suburban Washington, D.C. Child Protection Lobby is chaired by Kathleen M. Sheldon, a survivor of child sexual abuse and victim of child pornography. Over a number of years, beginning at age seven, Mrs. Sheldon was raped and forced to perform a variety of sexual acts with others, on camera, for the purpose of producing child pornography. Mrs. Sheldon is a living, "flesh and blood" example of the direct causal link between child pornography and child sexual abuse.

As an organization whose sole purpose is to ensure that laws exist to protect children from horrors like child pornography and child sexual abuse, Child Protection Lobby believes that it is essential that all such violations of both the letter and the spirit of the law be vigorously enforced and prosecuted and that such laws be interpreted as inclusively as possible, as was the Congressional intent.

Child Protection Program Foundation, Inc. ("CPPF") is a Delaware non-profit 501 (c) 3 corporation based in suburban Dallas, TX. CPPF is a 300,000 member group that publishes a 32 page "Child Protection Guide" to teach parents and educators how to recognize and cope with child sexual abuse. There are well over 3 million Child Protection Guides in circulation.

As an organization whose principal purpose is to help parent protect children from the horrors of child sexual abuse, of which child pornography is a leading cause, CPPF believes that it is essential that all such violations of both the letter and the spirit of the Child Protection Act be vigorously enforced and prosecuted and that such laws be interpreted as inclusively as possible, in keeping with the original Congressional intent.

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No. 93-723

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

X-CITEMENT VIDEO, INC., and RUBIN GOTTESMAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF PHE, INC. IN SUPPORT OF NEITHER PARTY

BRUCE J. ENNIS, JR.*
JOHN B. MORRIS, JR.
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Counsel for Amicus PHE, Inc.

* Counsel of Record

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BRIEF *AMICUS CURIAE* OF PHE, INC. IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS

PHE, Inc. is a North Carolina corporation engaged in the business of mailing to adult customers across the country contraceptives and various expressive materials protected by the First Amendment, including sexually explicit magazines and videotapes, and a medical newsletter edited by a physician entitled *Sex Over Forty*.[1] PHE's sexually explicit speech is sent only to adults, and only upon request.

PHE takes great care to assure compliance with state and federal obscenity laws. PHE conducts rigorous re-

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters memorializing their consent have been filed with the Clerk of the Court.

view procedures that include review of all sexually explicit materials by independent psychologists and sociologists to ensure that no materials sold by PHE violate the obscenity standards of any community in which they are sold. PHE's independent reviewers reject any material that might violate any one of the three prongs of the *Miller v. California* test for obscenity, even though the material must violate all three prongs to be found obscene. PHE has also met with law enforcement officials, sought their advice to ensure that no obscene materials are distributed by PHE, and strictly abided by the advice it has received. Nevertheless, PHE has twice been charged, but never convicted, with violation of obscenity laws.

PHE operates its business in an entirely open and above-board manner. PHE is a member of the local Chamber of Commerce, the Better Business Bureau, the Direct Marketing Association, and numerous other business and civic groups. PHE is a significant employer in its community, and offers its employees the same array of benefits as other leading businesses. PHE's business is vastly different from the clandestine, one-to-one world of child pornography.

PHE strongly opposes child pornography, and supports efforts to eradicate it. Nevertheless, PHE is concerned—based in part on experience, *see infra* at note 6—that prosecutors in their zeal to enforce obscenity and child pornography laws will target constitutionally protected expression and chill its distribution. Thus, PHE submits this brief *amicus curiae* to encourage the Court—if it decides to read a scienter element into 18 U.S.C. § 2252—to articulate a precise and substantial scienter requirement for prosecutions under § 2252.

SUMMARY OF ARGUMENT

The parties agree that in a child pornography prosecution scienter as to the minority of a participant is constitutionally required. The parties diverge on whether 18 U.S.C. § 2252 contains such a requirement, and if not, whether the Court should read the necessary scienter element into the statute. This brief is limited to the question of what degree of scienter is constitutionally required should the Court reach that question.

The jurisprudence of this Court requires that any exceptions to the protections of the First Amendment be "finely drawn" with "narrow specificity." If the Court reads a scienter element into the statute, it should articulate a clear and precise standard. Point I. To reduce the risk of an undue chilling effect caused by a low or vague scienter requirement, the Court should plainly state that evidence of "actual knowledge" or "willful blindness" is required in any prosecution under § 2252. A "recklessness" standard, as suggested by Judge Kozinski below, would unduly chill the distribution of protected expression. Point II. Finally, because of the clandestine and one-to-one nature of the sale and trade of child pornography, a "recklessness" standard would not diminish the government's legitimate enforcement efforts against it. A "recklessness" standard would only be relevant at the line between legitimate and illegitimate speech, which is exactly the point where a vague and uncertain standard like "recklessness" is most inappropriate. "Actual knowledge" and "willful blindness" are far more precise and constitutionally appropriate standards for scienter. Point III.

ARGUMENT

Amicus takes no position on the first two of the three questions presented by this case—whether 18 U.S.C. § 2252 lacks a scienter requirement as to the minority of a participant and, if so, whether the Court can and should read such a scienter requirement into the statute. *Amicus* addresses this brief only to the third question: If the Court reads a scienter requirement into the statute, what standard of scienter should apply? *Amicus* argues that to avoid unduly chilling the distribution of constitutionally protected expression, a clear and precise scienter element should be required for any prosecution under § 2252.

As a threshold matter, the parties agree that in child pornography prosecutions the Constitution requires *some* element of scienter as to the minority of a participant. There is no dispute that in such prosecutions the Constitution requires the government to establish scienter as to minority.[2] The Court's First Amendment cases generally require that scienter elements be clear and precise, *see* Points I and II. In the context of § 2252, those same cases require at least some scienter as to minority. Moreover, even apart from First Amendment requirements, the Court's general jurisprudence on scienter requires that the government establish scienter as to minority.[3] The issue

[2] The government implicitly acknowledged this conclusion in its petition for certiorari by arguing that the Court should read a scienter requirement into the statute "to avoid holding it unconstitutional." Petition for Certiorari at 7. In the court below, the government more expressly acknowledged that constitutional problems would arise absent a scienter requirement. *See* Petition for Rehearing with Suggestion for Rehearing En Banc, *United States v. X-Citement Video, Inc.*, at 6-12 (9th Cir. 1992) (Nos. 89-50556 & 89-50562).

[3] Under 18 U.S.C. § 2252, there is a single fact that separates entirely lawful conduct—distributing non-obscene visual depictions of individuals engaged in sexually explicit conduct—from potentially unlawful conduct—distributing non-obscene visual depictions of *a minor* engaged in sexually explicit conduct. As in *Morissette v. United States*, 342 U.S. 246 (1952), a defendant must have some knowledge of the single critical fact that makes his or her conduct a crime. *See id.* at 270-71. Section 2252 presents just the situation envisioned in *United States v. Feola*, 420 U.S. 671 (1975), "where legitimate conduct becomes unlawful solely because of the identity of the individual . . . affected." *Id.* at 685. In *Feola*, the accused knew "from the very outset that his planned course of conduct [was] unlawful," and thus his alleged ignorance as to one element was not problematic. *Id.* In contrast, absent scienter as to the minority of a participant, a distributor of non-obscene sexually explicit material has no reason to know that his or her conduct may be unlawful.

Moreover, § 2252 cannot be placed in the narrow category of strict liability offenses, for two reasons. First, Congress gave no clear indication of its intent to create such a strict liability offense, as is necessary "to justify dispensing with an intent requirement." *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978); *see also Liparota v. United States*, 471 U.S. 419, 426 (1985). Indeed, the legislative history plainly refutes such a conclusion. *See* Petition for Certiorari at 8-9. Second, § 2252 does not comport with the limitations regarding penalty and stigma normally required of strict liability offenses. *See Morissette*, 342 U.S. at 255-56; *see also Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960) (authored by then Judge Blackmun).

is not whether scienter as to minority is required, but how strong and precise the scienter requirement must be.

I. A SCIENTER REQUIREMENT AS TO MINORITY MUST BE CLEARLY AND PRECISELY ARTICULATED.

If the Court decides to read scienter as to minority into § 2252, the Court should establish a precise standard.

Under the Court's First Amendment jurisprudence, Congress may criminalize the distribution of expressive material if it contains child pornography. *See New York v. Ferber*, 458 U.S. 747, 764 (1982). The Court has made clear, however, that in the "sensitive area" of speech that is "unprotected" by the First Amendment, "the conduct to be prohibited must be adequately defined." *Id.* To be prohibited, expression must fall into one of a handful of "well-defined and narrowly limited

classes of speech." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). The "separation of legitimate from illegitimate speech" calls for "sensitive tools," and the line must be "finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

To be constitutional, a statute must "define the standard of responsibility with requisite narrow specificity." *Gooding v. Wilson*, 405 U.S. 518, 527 (1972). As the Court explained in *Gooding*—a "fighting words" case—a statute with an imprecise standard would be " 'easily susceptible to improper application.' " *Id.* at 528 (citation omitted). The Court's concern for specificity arises because "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Id.* at 521.

II. THE SCIENTER REQUIREMENT SHOULD BE "KNOWLEDGE" OR "WILLFUL BLINDNESS."

In defining a scienter requirement for § 2252, the Court should articulate a clear and unambiguous standard in order to avoid the chilling effect against which the scienter requirement guards. The Court in *Ferber* warned that "[l]ike obscenity statutes, laws directed at child pornography run the risk of suppressing protected expression by allowing the hand of the censor to be unduly heavy." *Ferber*, 458 U.S. at 756.

To avoid the risk of an unduly heavy governmental hand, the Court should make clear that a defendant must either have had "actual knowledge" of the minority of a participant, or must have been "willfully blind" to evidence that a participant was a minor.[4] Any lesser standard—including the "recklessness" standard suggested by

[4] The government appears to accept and embrace a standard of "actual knowledge" and "willful blindness." *See* Petition for Certiorari at 10-11 & n.4. As discussed below, however, the government incorrectly equates "recklessness" with "knowledge" and "willful blindness." *Id.* at 11 n.4.

Judge Kozinski below[5]—risks the undue chilling effect that *Ferber* and *Smith v. California*, 361 U.S. 215 (1959), seek to prevent.

In *Smith*, the Court struck down a low scienter requirement in order to reduce the chill and self-censorship the threat of criminal prosecution would otherwise cause. *Smith*, 361 U.S. at 152-54. Without an appropriate scienter element,

> "[e]very bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation on the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.

Id. at 153-54 (citation and footnote omitted). With only a recklessness standard read into § 2252, a distributor of expressive materials would be faced with two choices: Undertake the same inventory review found to be "altogether unreasonable" in *Smith*, or risk criminal liability subject to the interpretation of "recklessness" by a potentially overzealous prosecutor[6] and jury. Because the dis-

[5] *See United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1293 (9th Cir. 1992) (Kozinski, J., dissenting in part); Pet. App. 18a.

[6] *Amicus* PHE has itself been the direct victim of overzealous prosecutors spurred to action by private pro-censorship groups. *See United States v. PHE, Inc.*, 965 F.2d 848, 855, 860 (10th Cir. 1992) (finding indictment to be "tainted fruit of a prosecutorial attempt

tribution of sexually oriented material is highly controversial, and the stigma of even an allegation of distributing child pornography is so great, the distributor "will tend to restrict the books he sells to those he has inspected," with the result that "the State will have imposed a restriction upon the distribution of constitutionally protected . . . literature." *Smith*, 361 U.S. at 153.[7]

The risk of self-censorship of constitutionally protected material is especially great with subject matter involving sexuality and younger persons. As the Court has expressly acknowledged, there are concrete situations in which youthful-looking—but still adult—actors might be used in protected expression. This Court wrote in *Ferber* that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." *Ferber*, 458 U.S. at 763. The Court noted that this situation was "not merely a hypothetical possibility." *Id.* at 763 n.16 (citing news articles concerning a 24-year old playing the part of "Lolita," and other such substitutions in popular movies). Yet with a recklessness standard and the accompanying uncertainty about how such a standard would be applied, many dis-

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to curtail PHE's future First Amendment protected speech"); *PHE, Inc. v. U.S. Dep't of Justice*, 743 F. Supp. 15 (D.D.C. 1990) (granting preliminary injunction against bad faith pattern of prosecutions designed to suppress protected expression); *PHE, Inc. v. U.S. Dep't of Justice*, No. 90-0693, slip op. at 6, 11-12 & n.4 (D.D.C. Sept. 30, 1993) (describing role of private pro-censorship groups in encouraging prosecutions).

[7] Other than the issue of a woman's right to an abortion, no issue receives more attention—and opposition—from activist political groups than the distribution of sexually oriented material. Unlike the abortion issue, however, there are no strong groups or coalitions exerting countervailing political pressure in favor of the distribution of sexually oriented material. Thus, there is a realistic concern that prosecutions directed at sexually oriented material may be motivated by political considerations rather than by legitimate law enforcement objectives. *See supra* note 6.

tributors would refrain from distributing this type of constitutionally protected material. Simply put, although a distributor might have *no* knowledge that any performer was underage, a prosecutor could argue, and a jury could conclude, that merely having a "young looking" performer was sufficiently "reckless." Without a "knowledge" (or "willful blindness") standard, distributors would censor themselves and decline to distribute constitutionally protected materials.[8] To avoid chilling legitimate expression, the Court should make clear that "knowledge" or "willful blindness" is the scienter the government must establish to obtain a conviction under § 2252.

The Court's decision in *Osborne v. Ohio*, 495 U.S. 103 (1990), does not require a contrary conclusion. A superficial reading of that decision suggests that the Court approved a recklessness standard, writing that it "plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter." *Id.* at 115. That statement, however, does not address—much less resolve—the question presented here. *Ferber* indicated, without explication, only that "some" element of scienter was required, and the statute in *Osborne* plainly had "some" element of scienter. Neither *Ferber* nor *Osborne* addressed *the degree* of scienter that is constitutionally required. In *Osborne*, neither party (and no *amici*) addressed or argued in their briefs what degree of scienter is constitutionally required. Osborne's arguments about scienter went not to the degree of scienter, but to whether the Ohio Supreme Court could

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[8] In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court wrote:

> The Constitution requires proof of scienter to avoid the hazard of self-censorshop of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.

Id. at 511. In the child pornography context, "ambiguity" is inherent in evaluating—guessing—whether a given performer looks too young. Because of that uncertainty, the Court should articulate a strong scienter requirement.

constitutionally read a scienter requirement into the statute and retroactively apply it to Osborne. *Id.* at 115-16. For a question as important as the degree of scienter required in criminal prosecutions that implicate presumptively protected expression, the Court should not rely on a passing comment made without analysis or benefit of briefing by the parties.

Moreover, even if the Court were to accept as constitutionally sufficient the scienter requirement in the *Osborne* case, the Ohio Supreme Court in the decision on review in *Osborne* defined "recklessness" to require a showing of *knowledge as to the minority* of a performer. In *State v. Young and Osborne*, 525 N.E.2d 1363 (Ohio 1988), the court squarely held that "only those who are on notice as to the illicit character of the material are subject to criminal penalties." *Id.* at 1369. Because the only thing that makes non-obscene "child pornography"[9] illicit is the minority of a performer, the statute in *Osborne* required that one be "on notice" as to minority in order to be subject to criminal penalties. Ohio's use of the "recklessness" label is simply misleading.[10]

Although the government adopts a "knowledge" standard in its petition for certiorari, it also asserts that "it is not likely to make a difference in many cases whether the Court adopts a 'knowledge' standard or a 'recklessness' standard." Petition for Certiorari at 11 n.4. As the *Osborne* case makes clear, however, the concept of recklessness is vague and open to quite varying interpretations. In the context of expressive material, vague standards such as recklessness hardly qualify as "sensitive tools," *Speiser*, 357 U.S. at 525, that impose the "requisite narrow specificity," *Gooding*, 405 U.S. at 527.

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[9] There was no suggestion that the photographs in *Osborne*, which did not contain sexual conduct beyond exhibition of the genitals, met the legal defintion of obscenity.

[10] Similarly, the statute at issue in *Ferber* contained a "knowledge" requirement. *See New York v. Ferber*, 458 U.S. 747, 751 (1982).

On a practical level, as discussed in the following Point, the government may be correct that the knowledge/recklessness distinction is "not likely to make a difference in many cases," but that fact strengthens rather than weakens the objections to a recklessness standard. Because almost all distribution of child pornography in this country is done clandestinely with *full* knowledge of the minority of the participants, convictions of child pornographers would be obtained under either standard. Thus, the *only* situation in which the knowledge/recklessness distinction would "make a difference" is with a distributor of sexually oriented material who *lacks* knowledge as to the minority of the performer (and who in fact thought the performer to be an adult). In such a case, a prosecutor and jury may nevertheless conclude that the distributor was "reckless." In other words, the knowledge/recklessness distinction will *only* "make a difference" at the line between legitimate and illegitimate speech. *Speiser* requires that this line be "finely drawn," *Speiser*, 357 U.S. at 525, but a "recklessness" standard is surely not a "finely drawn" standard.

To avoid a vagueness challenge and to provide the guidance required by *Chaplinsky*, *Speiser*, *Gooding*, *Smith*, and other cases, the Court should require that knowledge as to minority be demonstrated in a child pornography prosecution. Any lesser standard would lead to undue self-censorship and thereby "tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly." *Smith*, 361 U.S. at 154.

III. A "RECKLESSNESS" STANDARD WOULD NOT SIGNIFICANTLY ADVANCE THE GOVERNMENTAL INTEREST OF STOPPING CHILD PORNOGRAPHY.

As the Court was informed in *Osborne*, "since the time of [the] decision in *Ferber*, much of the child pornography market has been driven underground." *Osborne*, 495 U.S. at 110. Indeed, essentially the *entire* child pornography market has been driven underground. *See* Final Report, Attorney General's Commission on Pornography, at 406 (1986) ("Meese Commission") (child pornography is a "cottage industry" that is "largely distinct from any aspect of the industry of producing and making available sexually explicit materials involving only adults"). As described in *Osborne* and extensively illustrated in *Jacobson v. United States*, 112 S. Ct. 1535, 1537-40 (1992), the sale or exchange of child pornography in this country is accomplished by individual contacts and correspondence with full knowledge of the content of the materials being exchanged, including the minority of the participants. With that type of transaction, the government can establish knowledge either with direct evidence or "by reference to facts and circumstances surrounding the case [showing] that [a defendant] knew that his conduct was unauthorized or illegal." *Liparota v. United States*, 471 U.S. 419, 434 (1985). *See also Smith*, 361 U.S. at 154 (actual knowledge can be established with circumstantial evidence).[11] A "recklessness" standard would not significantly further the legitimate governmental interest in stopping the distribution of child pornography.

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[11] The Court in *Liparota* specifically gave as an example of such a "fact and circumstance" that the defendant "conducted part of the transaction in a back room." *Id.* at 434 n.17. With child pornography, essentially all transactions are conducted "in a back room."

CONCLUSION

If the Court reaches the question of what degree of scienter is required under § 2252, it should make clear that "actual knowledge" or "willful blindness" as to minority is constitutionally required.

Respectfully submitted,

BRUCE J. ENNIS, JR.*
JOHN B. MORRIS, JR.
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Counsel for Amicus PHE, Inc.

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* Counsel of Record

(10)

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October Term, 1993

United States of America,

Petitioner,

vs.

X-Citement Video, Inc., and Rubin Gottesman,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief for the States of Ohio, Alaska, Hawaii, Illinois, Michigan, Montana, Nevada, North Carolina, Pennsylvania, South Dakota, Territory of the Virgin Islands, Virginia and Wisconsin as Amici Curiae in Support of Petitioner

---

Additional States:
Alabama
Louisiana
South Carolina
Commonwealth of Puerto Rico

LEE FISHER
Attorney General

RICHARD A. CORDRAY
State Solicitor
(Counsel of Record)

SIMON B. KARAS
Deputy Chief Counsel
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-5026

COUNSEL FOR AMICUS CURIAE STATE OF OHIO [Other Counsel Listed on Inside Front Cover]

21pp

The Honorable Jimmy Evans
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130

The Honorable Bruce M. Botelho
Attorney General of Alaska
Office of the Attorney General
4th Floor, Court Building
P.O. Box 110300
Juneau, Alaska 99811-0300

The Honorable Robert Marks
Attorney General of Hawaii
Office of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813

The Honorable Roland W. Burris
Attorney General of Illinois
Office of the Attorney General
State of Illinois Center
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

The Honorable Frank J. Kelley
Attorney General of Michigan
Office of the Attorney General
Law Building, 525 West Ottawa
P.O. Box 30212
Lansing, Michigan 48909

The Honorable Joseph P. Mazurek
Attorney General of Montana
Office of the Attorney General
Justice Building
215 North Sanders
Helena, Montana 59620

The Honorable Frankie Sue Del Papa
Attorney General of Nevada
Office of the Attorney General
Capitol Complex
Carson City, Nevada 89710

The Honorable Michael F. Easley
Attorney General of North Carolina
Office of the Attorney General
Department of Justice
2 East Morgan Street
P.O. Box 629
Raleigh, North Carolina 2760[illegible]

The Honorable Richard P. Ieyoub
Attorney General of Louisiana
Office of the Attorney General
P.O. Box 94005
Baton Rouge, Louisiana 70804-9005

The Honorable Ernest D. Preate, Jr.
Attorney General of Pennsylvania
Office of the Attorney General
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120

The Honorable Mark Barnett
Attorney General of South Dakota
Office of the Attorney General
500 East Capitol
Pierre, South Dakota 57501-5070

The Honorable
Rosalie Simmonds Ballentine
Attorney General of the Virgin Islands
Office of the Attorney General
Department of Justice
G.E.R.S. Complex
No. 48B-50C Kronprindsens Gade
2nd Floor
St. Thomas, Virgin Islands 00802

The Honorable
James S. Gilmore, III
Attorney General of Virginia
Office of the Attorney General
The Supreme Court Building
101 North 8th Street, 5th Floor
Richmond, Virginia 23219

The Honorable James E. Doyle
Attorney General of Wisconsin
Office of the Attorney General
114 East, State Capitol
P.O. Box 7857
Madison, Wisconsin 53707

The Honorable T. Travis Medlock
Attorney General of South Carolina
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

The Honorable Pedro R. Pierluisi
Attorney General of Puerto Rico
Department of Justice
P.O. Box 192
San Juan, Puerto Rico 00902

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INTEREST OF THE AMICI CURIAE

The States that have joined this brief as amici curiae are directly engaged in the continuing battle to prevent the sexual exploitation of minors. These efforts include the prosecution of child sexual abuse cases, the protection and encouragement of children who are willing to report and give testimony in such matters, and the initiation of civil and criminal actions to combat the interstate and intrastate production and distribution of child pornography materials. The amici States bring numerous civil actions and obtain many criminal convictions each year in these areas, which often require them to defend their own statutes against constitutional challenges similar or identical to those raised in this case.

The direct interest of the amici States in the proper interpretation and application of the First Amendment to cases involving child pornography is demonstrated by the fact that the leading decisions in this area include cases involving the States as well as cases involving the Federal government. *See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982). Although the issues raised in this case begin with the proper interpretation of a federal statute, they also encompass the constitutional boundaries that inform and restrict the permissible interpretation and application of all statutes — both federal and state — directed against trafficking in child pornography. As such, these issues are of direct interest to the amici States.

Moreover, even the matter of the proper interpretation of this federal statute presents an issue of direct interest to the States, for two reasons. First, the continuing battle against trafficking in child pornography is being pursued through the complementary and cooperative law enforcement efforts of the States and the Federal government, aimed at both the intrastate and interstate components of such traffic. Second, the successful prosecution of those who willingly distribute child pornography materials for profit, whether such convictions are attained under federal law or state law, is of immediate importance to the States, since almost all

such criminal traffickers are citizens of one or another State and since their activities are inimical to the public welfare in all the States affected by such unlawful trafficking.

For all of these reasons, the amici States are deeply concerned about the issues raised in this case and urge that this Court should reverse the erroneous decision of the Ninth Circuit.

ISSUE PRESENTED

Whether the court of appeals correctly held that 18 U.S.C. §2252, which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face on the ground that it does not require the government to prove that the defendant knew that the materials at issue show minors engaging in sexually explicit acts.

SUMMARY OF ARGUMENT

The court below erred in two respects: as a matter of statutory interpretation and as a matter of constitutional law. The federal statute at issue here, 18 U.S.C. §2252, does not require those who traffic in visual depictions of sexually explicit conduct by minors to know the age of any such minor performers. Neither the statute itself nor its legislative history requires such an interpretation. Instead, the statute is properly construed to require a mens rea of recklessness concerning the age of such minor performers, which is consistent both with applicable canons of construction and with the legislative history available here.

The First Amendment does not require those who traffic in child pornography materials to know the age of any minors whose sexual conduct is depicted in the materials. Instead, criminal statutes aimed at trafficking in child pornography are constitutional if they require that the defendant know the character and nature of the materials distributed and are reckless as to whether the materials contain visual depictions of sexually explicit conduct by minors. But mistake

of age is not constitutionally required to be made a defense to prosecution under state and federal laws designed to protect children against sexual abuse and exploitation. If any such restrictive standard were imposed as a constitutional requirement, then state and federal efforts to curb trafficking in child pornography would be severely damaged; as long as traffickers went about their business with nothing more than a conscious disregard for the nature of child pornography materials, and did not inquire specifically about the precise age of any youthful-looking performers, then it would be impossible to prosecute them for their distribution of such materials. No such absurd result is compelled either by the First Amendment itself or by this Court's prior decisions applying it to criminal laws against child pornography.

ARGUMENT

The Court of Appeals for the Ninth Circuit held that 18 U.S.C. §2252 contained no mens rea requirement whatsoever concerning the age of minor performers whose sexually explicit conduct is portrayed in child pornography materials. Pet. 9a-11a. It also concluded that the First Amendment requires a defendant to have actual knowledge that at least one of the performers is under age 18. *Id.* 14a-15a. Putting the two together, the court thus found the statute to be unconstitutional. Both conclusions, however, are in error.

I. 18 U.S.C. §2252 IS PROPERLY CONSTRUED TO REQUIRE A MENS REA OF RECKLESSNESS CONCERNING THE AGE OF MINOR PERFORMERS BY THOSE WHO TRAFFIC IN VISUAL DEPICTIONS OF SEXUALLY EXPLICIT CONDUCT BY MINORS.

The federal statute at issue here authorizes a felony conviction for any person who "knowingly transports or ships" or "knowingly receives, or distributes," or "knowingly reproduces . . . for distribution" in interstate or foreign commerce "any visual depiction" whose production "involves the use of a minor engaging in sexually explicit conduct" and which depicts "such conduct." 18 U.S.C.

§2252(a)(1) & (2). The evident grammatical structure of this provision is that the adverb "knowingly" modifies each of the verbs contained in the statute — "transports," "ships," "receives," "distributes," and "reproduces" — but none of its other language. If a defendant "knowingly" performs any of these acts with respect to the kinds of materials described — *i.e.*, materials containing a visual depiction of sexually explicit conduct engaged in by a minor — then he may be convicted under the express terms of the statute. The bare language of the statute does not appear to require, however, that the defendant have actual knowledge that one or more of the performers whose sexually explicit conduct is depicted in those materials is in fact a minor, as several courts have held. *See, e.g., United States v. Thomas*, 893 F.2d 1066, 1070 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990); *United States v. Langford*, 668 F.2d 1088, 1089 n.1 (7th Cir.), *cert. denied*, 461 U.S. 959 (1982); *United States v. Kleiner*, 663 F. Supp. 43, 44 (S.D. Fla. 1987); *United States v. Tolczeki*, 614 F. Supp. 1424, 1429 (N.D. Ohio 1985). The same conclusion has also been reached about 18 U.S.C. §2251, which is a companion provision to this statute. *See, e.g., United States v. United States Dist. Ct.*, 858 F.2d 534, 537-38 (9th Cir. 1988).

Were it not for the possible constraints of the First Amendment in this area, the interpretation reached by the courts cited above would be dispositive, without more. In cases involving physical offenses against minors, for example, it is well settled that strict liability can be imposed for crimes such as statutory rape.[1] This Court has held, however, that the First Amendment provides some protection even for those materials that can be classed as child pornography, and thus that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *New York v. Ferber*, 458 U.S. 747, 765 (1982); *cf. Smith v. California*, 361 U.S. 147, 152- 55 (1959) (holding that "all mental elements" cannot constitutionally

[1] *See, e.g.*, Ohio Rev. Code §2907.02(A)(1)(b) (offense of rape includes sexual conduct with a minor "less than thirteen years of age, whether or not the offender knows the age of such person").

be eliminated from the crime of dealing in obscene materials); *Hamling v. United States*, 418 U.S. 87, 123 (1974) (holding it constitutionally sufficient if the defendant "had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials" under law banning distribution of obscene materials). It is for this reason that the Ninth Circuit, once it had construed the statute at issue here to contain no mens rea requirement at all concerning whether any minor's sexually explicit conduct is depicted in the offending materials, went on to nullify this statute as unconstitutional.

Yet this grammatical analysis of 18 U.S.C. §2252 is not the end of the inquiry by any means, and this constitutional analysis is suspect. Instead, the statute is properly construed to require a mens rea of recklessness concerning the age of such minor performers, which is consistent both with applicable canons of construction and with the legislative history available here.

In *Osborne v. Ohio*, 495 U.S. 103 (1990), for example, this Court provided a model for the correct analysis of such statutes. The case concerned the constitutionality of a state criminal law that prohibited the possession or viewing of child pornography materials. The state law itself, like the federal statute at issue here, did not contain explicit guidance about the proper mens rea provision. *See* Ohio Rev. Code §2907.323(A)(3). The Ohio Supreme Court, however, had ruled that it must import a mens rea of "recklessness" into the child pornography law. *Id.* at 115; *see State v. Young*, 37 Ohio St. 3d 249, 252-53 (1988). It did so by applying the State's residual statute, which provided that where a statute "neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." Ohio Rev. Code §2901.21(B).[2] This

[2] This residual statute is a codification of traditional principles of criminal law set forth in the Model Penal Code. *See* Model Penal Code §2.02(3), comment 5 n.36 (Proposed Official Draft 1962 and Revised Comments 1985).

Court upheld the statute as so construed against the defendant's claim that it violated his rights under the First Amendment. 495 U.S. at 113 n.9.

The same problem is presented in this case: whether a statute that punishes various actions involving materials that visually depict sexually explicit conduct of a minor can be construed to require any particular mens rea about whether any of the persons so depicted is indeed a minor. In *Osborne*, this Court explicitly approved the constitutionality of such a procedure whereby the courts may render a narrowing construction of child pornography laws to satisfy any constitutional requirements as to mens rea. 495 U.S. at 115. The same kind of narrowing construction has been adopted when applying statutes in other areas as well. *See, e.g., Liparota v. United States*, 471 U.S. 419, 426 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422, 444 (1978).

In determining whether any such mens rea should be imported into 18 U.S.C. §2252 and, if so, what mens rea is proper, this Court does not have available an explicit residual statute such as the Ohio Supreme Court applied in *Osborne*. Nonetheless, traditional methods of statutory construction employed by this Court provide guidance that is just as effective here. In the absence of any such legislative directive, this Court should continue to apply the standard principles that have been recognized and applied by the courts in previous decisions.

First, this Court has imported appropriate mens rea into other federal criminal statutes by referring to principles of the common law and to the general provisions of the Model Penal Code. *See, e.g., Liparota*, 471 U.S. at 423-27 (relying on the "background assumption[s] of our criminal law" to determine the proper mens rea requirement); *Morissette v. United States*, 342 U.S. 246, 250 (1952) (observing that the requirement of some mental state for criminal responsibility is "universal and persistent in mature systems of law"). Applying those principles, for instance, this Court has held that "criminal offenses requiring no mens rea have a

'generally disfavored status.' " *Id.* at 426 (quoting *United States Gypsum Co.*, 438 U.S. at 438).[3] These same principles indicate that "recklessness" constitutes the proper mens rea under 18 U.S.C. §2252 for the particular element of whether any persons whose sexually explicit conduct is depicted in the offending materials is actually a minor.

As the court below noted, and as is plain on its face, this statute does impose a mens rea of "knowledge" with respect to the transportation, shipping, receipt, distribution, and reproduction of child pornography materials. The issue is simply what mens rea is intended to be or should be applied to the distinct element of this crime that those materials must visually depict "a minor engaging in sexually explicit conduct." Pet. 13a-15a. Under the Model Penal Code, the baseline mens rea for any material element of a crime not otherwise specified by the legislature is "recklessness." *See* Model Penal Code §2.02(3) (Proposed Official Draft 1962 and Revised Comments 1985). As the commentary elaborates, this approach "accepts as the basic norm what is usually regarded as the common law position. More importantly, it represents the most convenient norm for drafting purposes." *Id.* comment 5 & n.35. Moreover, this baseline position reflects the "background assumption of our criminal law," *Liparota*, 471 U.S. at 426, that awareness of risk, which creates both moral blameworthiness and the potential for deterrence, represents the basic foundation that should underlie criminal culpability:

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[3] The Court has indeed recognized that Congress has the power to create strict liability crimes whenever it judges them to be appropriate. *See, e.g., United States Gypsum Co.*, 438 U.S. at 437-38. Given the language and legislative history of this law, however, the amici States do not contend that Congress intended to impose strict liability here on the issue of whether any of the persons whose sexually explicit conduct is depicted is actually a minor. Thus, the Court need not decide in this case whether strict liability as to this particular element, or indeed any lesser mens rea than recklessness, is constitutionally permitted, as amici would contend. *See also infra* note 5.

> The distinction, one of the most critical to criminal law, between negligence and all three higher levels of culpability, reflects that a defendant acting purposely, knowingly, or recklessly is aware of the harmful consequences that may result and is therefore both blameworthy and deterrable, but a defendant acting negligently is unaware of harmful consequences and therefore is arguably neither blameworthy nor deterrable. . . . For this reason, recklessness is considered the norm for criminal culpability . . .

P. Robinson & J. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 695-96 (1983) (cited in *Liparota*, 471 U.S. at 423 n.5). Courts have therefore held that this traditional mens rea should be imported into criminal statutes unless some obvious reason appears on the face of the statute not to do so. *See, e.g., State v. Lima*, 546 A.2d 770 (R.I. 1988).

As a matter of statutory construction, the only realistic alternative here to adopting this standard mens rea under the common law and the Model Penal Code is to apply the adverb "knowingly" to every element of this statute. There is some support for this approach under the Model Penal Code also. *See id.* §2.02(4) & comment 6. However, the drafters of the Model Penal Code noted that the simple mention of a mens rea requirement with respect to one element of a crime often is not intended to extend to all elements of the same crime, and where there is ambiguity, "recklessness should suffice in the absence of special provision to the contrary." *Id.* This Court has also embraced this preferred "elements" approach, observing that the "required mental state may of course be different for different elements of a crime." *Liparota*, 471 U.S. at 423 n.5 (citing cases); *see also* P. Robinson & J. Grall, *Element Analysis, supra* (explaining the proper basis for independent analysis and construction of the mens rea appropriate to

each element of a crime).[4]

A further command of statutory construction is pertinent here also. For if such a saving construction of this statute is "fairly possible," then this Court has repeatedly held that the courts have a duty to construe the law so as to preserve its constitutionality. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing cases and restating this duty by holding that it applies unless any such interpretation "is plainly contrary to the intent of Congress"). In view of the statements made by this Court in *Ferber*, which might at least appear to rule out strict liability for any elements of the crime of child pornography, the courts should carry out their obligation to save the constitutionality of 18 U.S.C. §2252 by importing a recklessness mens rea into the statute, as urged by the dissenting judge below. Pet. 23a-28a & n.6. Such an interpretation is not only "fairly possible" here, but indeed is the most defensible construction of this statute.

In *Liparota*, this Court also indicated that the legislative history of a statute is a proper source for divining the proper mens rea to read into its provisions. 471 U.S. at 425, 430 & n.13. Here the legislative history of this statute is in accord with the reading set forth above. This section was originally put forward as an amendment to a bill that eventually was enacted as the Protection of Children Against Sexual Exploitation Act of 1977. The amendment was sponsored by Senator Roth. During floor debate on the proposal, Senator Percy explained that the term "knowingly" did not require

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[4] As Petitioner has pointed out, the practical differences between a mens rea of recklessness and one of knowledge are diminished by the fact that the courts construe the "knowing" standard to encompass instances of "willfull blindness," Pet. 11 n.4, and have upheld the "ostrich instruction" in defining "knowingly." *See, e.g., United States v. Kehm*, 799 F.2d 354 (7th Cir. 1986). Yet the Justice Department stated at the time this statute was enacted that it could pose "difficult problems of proof" if it were interpreted to require a showing that the defendant actually knew that one or more of the persons whose sexually explicit conduct was depicted is in fact a minor, as shown in the discussion, *infra*, in the text of this section.

that the trafficker must have actual knowledge that minors were depicted, and instead only a minimum standard of recklessness was intended. 123 Cong. Rec. 33,050 (1977) (trafficker "must have either, first, actual knowledge that the materials do contain child pornography depictions or, second, circumstances must be such that he should have had such actual knowledge," but mere negligence would not suffice for a conviction). Senator Roth agreed with this explanation, stating that it was "absolutely correct." *Id.*

Moreover, the Senate Committee report on this legislation contains a letter from then-Assistant Attorney General Patricia M. Wald to Senator Eastland, who was then the Chairman of the Senate Judiciary Committee. In the letter, the Justice Department identified as one of its principal concerns that the bill as drafted could pose "difficult problems of proof," since "in a great many cases the age of the subject will not be readily apparent from an observation of the film or photograph." S.Rep. No. 438, 95th Cong., 1st Sess. 28 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 63. The Justice Department thus made two suggestions that were adopted by Congress in enacting the legislation.

First, the Justice Department suggested that the word "knowingly" should be stricken altogether from 18 U.S.C. §2251, to avoid any interpretation "requiring the Government to prove the defendant's knowledge of everything that follows 'knowingly,' including the age of the child." *Id.* at 29, 1978 U.S.C.C.A.N. at 64. "We assume that it is not the intention of the drafters to require the Government to prove that the defendant knew the child was under age sixteen but merely to prove that the child was, in fact, less than age sixteen." *Id.*

Second, the Justice Department suggested that the word "knowingly" be retained in 18 U.S.C. §2252 to make it "clear that the bill does not apply to common carriers or other innocent transporters who have no knowledge of the nature or character of the material they are transporting." *Id.* The Department remained concerned, however, about the proof problems that it had just identified, and suggested that to

"clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved." The Justice Department thus concluded that with these changes, the government would be required to prove "that the defendant knew, had reason to know, or intended that" the materials visually depicted sexually explicit conduct by a minor," *id.* at 28, 1978 U.S.C.C.A.N. at 64, which is a classic formulation of a baseline "recklessness" mens rea requirement. *Cf.* Model Penal Code §2.02(3) (baseline of recklessness includes knowingly, recklessly, or purposely).

Congress did in fact remove the term "knowingly" from the final version of 18 U.S.C. §2251, and expressly incorporated the Justice Department's letter into the Senate Committee report on the bill. There is no apparent basis for concluding that the Congress intended to ignore the concerns expressed by the Justice Department and create "difficult problems of proof" identical to those the Department expressly cautioned Congress to avoid. All such concerns, in addition to any potential constitutional concerns, are eliminated by simply reading 18 U.S.C. §2252 as sensibly applying a mens rea of recklessness to the element of whether the offending materials depict sexually explicit conduct by a minor.

II. CRIMINAL STATUTES AIMED AT TRAFFICKING IN CHILD PORNOGRAPHY ARE CONSTITUTIONAL IF THEY REQUIRE THAT THE DEFENDANT KNOW THE CHARACTER AND NATURE OF THE MATERIALS DISTRIBUTED AND ARE RECKLESS AS TO WHETHER THE MATERIALS CONTAIN VISUAL DEPICTIONS OF SEXUALLY EXPLICIT CONDUCT BY MINORS, BUT MISTAKE OF AGE IS NOT CONSTITUTIONALLY REQUIRED TO BE MADE A DEFENSE TO PROSECUTION UNDER SUCH STATUTES.

The court below also erred in holding that "the First Amendment mandates that a statute prohibiting the distribution, shipping, or receipt of child pornography require knowledge of the minority of the performers as an element of the crime it defines." Pet. 15a. On the contrary, the First Amendment as authoritatively construed by this Court does not require those who traffic in child pornography materials to have actual knowledge that any of the performers whose sexual conduct is depicted in the materials is in fact a minor. Instead, criminal laws aimed at trafficking in child pornography are constitutional if they require that the defendant knows the character and nature of the materials at issue and is reckless as to whether those materials contain visual depictions of sexually explicit conduct by minors.

This conclusion, again, follows directly from the holdings of *Ferber and Osborne*. In *Ferber*, this Court determined that even child pornography materials maintain some protection under the First Amendment, and held that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765. This requirement was reiterated in *Osborne*, 495 U.S. at 115, but it was not determined in either case that the only constitutional standard of mens rea, was a "knowingly" standard, or that this mens rea must attach to every element of such an offense.

Instead, the Court said two specific things in these cases about the constitutional restrictions on mens rea for child pornography laws. First, borrowing from prior obscenity cases, it approved as constitutionally sufficient the *general* requirement "that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling*, 418 U.S. at 123. In *Osborne*, however, the Court further elaborated that a *specific* mens rea requirement of recklessness would be constitutionally sufficient in child pornography prosecutions, thus requiring not that a defendant must actually know a performer was a minor but that a defendant must at least be reckless as to that fact. The Court squarely held that this mens rea "plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter." 495 U.S. at 115; *see also id.* at 113 n.9.[5]

Accordingly, mistake of age is not constitutionally required to be made a defense to prosecution under state and federal laws designed to protect children against sexual abuse and exploitation, if an appropriate mens rea, such as recklessness, is established. The court below relied on its prior decision in *United States Dist. Ct.*, 858 F.2d at 538-44, which had engrafted such a requirement onto 18 U.S.C. §2251. That decision, however, was rendered before *Osborne* was decided, and therefore was reached without this Court's further guidance on what element of scienter is needed to satisfy the constitutional restrictions identified in *Ferber*. Because of its mistaken construction of 18 U.S.C. §2252, the court below gave only the most passing consideration to *Osborne*, citing it only once, Pet 12a, and not seriously attempting to apply its more detailed analysis in this case. In the wake of *Osborne*, however, it is now clear that the Constitution does not require the courts to engraft any

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[5] As the dissent noted below, this Court has not yet provided any definitive resolution of the issue whether a mens rea weaker than recklessness satisfies the First Amendment in this area. Pet. 27a n.8, as amici would contend, but that issue is not implicated here. *See also supra* note 3.

mistake of age defense onto child pornography statutes. If any such mistake is so profound that it entirely defeats mens rea recklessness, then perhaps it may prevail in exonerating a defendant. But any defendant who knows the general nature of the offending materials, and who proceeds nonetheless with conscious disregard of the risk that such materials constitute child pornography, can properly be punished under this statute or under any similar statute.

If any such restrictive standard were to be imposed as a constitutional requirement, then state and federal efforts to curb the sexual exploitation of children could be severely damaged. For the very reasons identified by the Justice Department in its analysis of this statute when it was first proposed in Congress, "difficult problems of proof" would be posed by any requirement that a defendant must actually know the age of a minor participant, because "in a great many cases the age of the subject will not be readily apparent from an observation of the film or photograph." S.Rep. No. 438, at 28, 1978 U.S.C.C.A.N. at 63. Although the District Court did find such knowledge to be proved beyond a reasonable doubt in this case, Pet. 41a, the general background of the Traci Lords materials at issue this case amply vindicates this concern. *See, e.g., United States Dist. Ct.*, 858 F.2d at 537-43. Thus, as long as traffickers in child pornography were to go about their business with nothing more than a conscious disregard for the nature of such materials, and did not inquire specifically about the precise age of any youthful-looking performers, it would be impossible to prosecute them for trafficking in such materials. No such absurd result is compelled either by the First Amendment itself or by this Court's prior decisions applying it to criminal laws against child pornography.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Petitioner, this Court should reverse the decision of the Court of Appeals for the Ninth Circuit and reinstate the District Court's original convictions of Respondents under 18 U.S.C. §2252.[6]

Respectfully submitted,

LEE FISHER
Attorney General of Ohio

RICHARD A. CORDRAY
State Solicitor
(Counsel of Record)

SIMON B. KARAS
Deputy Chief Counsel
State Office Tower
30 East Broad Street
17th Floor
Columbus, Ohio 43215
(614) 466-5026

COUNSEL FOR AMICUS CURIAE STATE OF OHIO [Other Counsel Listed on Inside Front Cover]

April 14, 1994

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[6] If this Court concludes that there is no constitutional infirmity with the statute, then the proper disposition would be to reinstate the original convictions, since the District Court explicitly found that Respondents did have actual knowledge that the materials at issue in this case depicted the sexually explicit conduct of a minor girl. Pet. 39a, 41a.

(11)

No. 93-723

Supreme Court
FILE
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

vs.

X-CITEMENT VIDEO, INC. AND RUBIN GOTTESMAN,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, AND THE PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE*

MICHAEL A. BAMBERGER
Sonnenschein Nath & Rosenthal
1221 Avenue of the Americas
24th Floor
New York, New York 10020-1089
(212) 768-6700

Counsel of Record for Amici Curiae

Of Counsel:
Margaret S. Determan
Julie Goldscheid

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STATEMENT

The American Booksellers Foundation for Free Expression, Council for Periodical Distributors Associations, Freedom to Read Foundation, International Periodical Distributors Association, and Periodical and Book Association of America, Inc. (together, "*amici*") submit this joint brief urging that the Court declare the proper *mens rea* scienter standard required to sustain a conviction under 18 U.S.C. § 2252(a)(2), and remand the case for consideration in light of such standard. *Amici* respectfully urge the Court to require that convictions under 18 U.S.C. § 2252(a)(2) be based upon proof that the defendant had actual knowledge that the visual work unlawfully depicted at least one person who was a minor.

Amici do not submit this brief in support of either party, but rather to aid the Court in its determination of the appropriate standard of knowledge required under § 2252 and to focus the attention of the Court on the potential serious and substantial harm that would be inflicted upon thousands of publishers, distributors and retailers of books, magazines and other visual materials if a less stringent *mens rea* standard were adopted by the Court. This brief is submitted upon the written consents of counsel to both petitioner and respondents, which are submitted herewith.

THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and to educate booksellers, other members of the book industry and the public about the dangers of censorship, and to promote and to protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations ("CPDA") is the national trade association for approximately 400 independent local wholesale distributors who distribute over ninety-five percent of all magazines, comic books, paperback books and newspapers in every state of the United States.

The Freedom to Read Foundation ("FTR") is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The International Periodical Distributors Association ("IPDA") is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Periodical and Book Association of America, Inc. ("PBAA") is an association of magazine and paperback book publishers who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada, for ultimate sale to the public, principally at newsstands.

INTERESTS AND CONCERNS OF THE *AMICI*

This case poses the question whether a distributor of visual materials may be subject to criminal prosecution under the federal child pornography statute without actual knowledge that materials it distributed included unlawful depictions of minors. The court below struck as unconstitutional § 2252 of the Protection of Children Against Sexual Exploitation Act of 1977

(the "Act"), because it fails expressly to state as a statutory element knowledge of the minority of one of the subjects of the photograph. Before the Ninth Circuit, the government ultimately conceded, as *amici* here contend, that, to be constitutional, § 2252 requires proof that a defendant knew that materials depicted minors, *i.e.*, that they constituted child pornography. All the circuit courts considering the issue have reached the same conclusion. The dissenting judge below, relying principally on the Court's construction of an Ohio statute in *Osborne v. Ohio*, 495 U.S. 103 (1990), concluded that a distributor or seller of visual materials could be prosecuted for child pornography if it was "reckless" as to whether the material depicted a minor engaged in sexual conduct.

Amici's members distribute, sell and loan books, magazines, videos, works of art and printed materials of all types, including ones that are scholarly, literary, artistic, scientific and entertaining. They are the essential intermediaries between the creators and the consumers of artistic and literary materials. *Amici's* members do not own what are commonly referred to as adult retail stores; nor do they distribute the adult materials that are generally found in such stores. *Amici's* members do, however, distribute and sell mainstream materials that may include photographs or depictions of adults who may appear to be young, engaged in sexual conduct. Because *amici's* members include businesspeople who distribute, sell and loan popular and potentially provocative books, periodicals, art and video, *amici* have a significant interest in the resolution of the issue before the Court.

Sexual exploitation of children is properly denounced. Accordingly, otherwise constitutionally-protected visual images may be subject to criminal sanction if they involve minors. In this legal context, the subject's age may constitute the single factor separating child pornography from protected speech. To balance the policy protecting minors and the constitutionally-compelled presumption against restricting expressive activity, the United

States Constitution requires that distributors and sellers not be subject to criminal prosecution unless they knew they were handling materials depicting children engaged in sexual conduct. A standard that protects distributors who lack knowledge of the minority of the subject depicted affords mainstream distributors and sellers a clear and ascertainable test in order to conduct their businesses without inadvertent criminal exposure, while still sanctioning those who knowingly traffic in child pornography. Any lesser standard, including the "recklessness" standard proposed by the dissent below, fails to recognize the practical realities of the daily businesses of *amici's* members.

By the nature of their work, the members of *amici* are not the creators of the visual materials and generally have no direct contact with the models or persons photographed. Publishers receive material from authors, other publishers and agents. They in turn pass the work on to intermediaries, such as the members of IPDA and CPDA, who act as distributors and wholesalers. The distributors and wholesalers redistribute the works to retailers. Given the volume of materials involved, in most cases, these intermediaries do not look into or even at these works.

To comply with a standard that permits conviction absent actual knowledge, distributors would be forced to scrutinize each item they handle, whether in their inventory, in their catalogues or on their shelves, and to guess at the age of the subjects. They would be forced to predict whether they could be judged to have consciously disregarded a substantial risk that an actor in one of countless volumes of materials was a minor engaged in lascivious conduct. To prevent ruinous prosecutions, full-time censors would be needed to review each page of each book or magazine to assure that no images could be adjudged to give rise to that undefined risk. The identity of the fact-finder adds to the problem; a juror concerned about child pornography easily could accept the argument that it is reckless not to methodically review every volume or video in the face of a child

pornography allegation without fully appreciating the impact on legitimate businesses and on the free distribution of constitutionally protected visual materials.

The chilling effect of incorporating anything but a "knowing" standard thus becomes real and substantial. Even if distributors practically could undertake the enormous investment of the monitoring effort required by a lesser standard, they would still risk misguessing a performers' perceived age and would be forced to err on the side of restricting legally-protected materials depicting minors.

SUMMARY OF ARGUMENT

This appeal focuses the Court on the state of knowledge necessary to prove the key element that distinguishes protected visual materials from those subject to criminal prosecution as child pornography -- the age of the performer. Under the United States Constitution, visual images that are not obscene, and therefore are freely distributed, may be regulated only if they involve unlawful depictions of minors. This Court's prior rulings require scienter for a conviction of distribution of child pornography. All members of the panel below and all other courts of appeal faced with the issue agree that scienter must be proved before sanctioning speech.

Section 2252 proscribes "knowing" receipt or distribution, or "knowing" reproduction of visual depictions that meet the statutory requirements defining child pornography, but it does not clearly specify the level of scienter required with respect to the performer's age. As a matter of logic and statutory construction, it is impossible "knowingly" to receive, distribute or reproduce child pornography without also knowing that the materials depict minors. Reading § 2252 to require actual knowledge of the performer's minority is the only logical and constitutionally-appropriate standard for distributors and retailers who are not readily able to verify the ages of the individuals

depicted in the visual materials they trade, and who do not as a matter of course review or even open the materials they pass from creator to consumer. As a practical matter, they typically cannot conduct such a review because of volume and timeliness constraints. Such distributors and retailers should not be subject to criminal liability unless they distributed the materials with knowledge of the implications of their acts.

The vast majority of prior decisions have recognized that the "knowing" requirement of § 2252 applies to the entire statute and precludes prosecution absent proof that the defendant knew one of the performers was a minor. Construing § 2252 to require knowledge that materials involved a minor is not inconsistent with the recklessness standard accepted in *Osborne v. Ohio*, 495 U.S. 103 (1990). The Court there, construing an Ohio statute, did not have before it the question of the constitutionally-appropriate level of scienter in child pornography cases. In addition, the "recklessness" standard accepted in *Osborne* had been defined by the Ohio Supreme Court in a manner closer to "knowledge," *Ohio v. Young*, 525 N.E.2d 1363, 1369 (Ohio 1988), further supporting the "knowledge" requirement and demonstrating graphically the danger of endorsing a standard of "recklessness," a word of many and variant meanings.

The legislative history also supports a finding that § 2252 requires knowledge that the materials depicted minors. The floor debates expressly reflected Congress' intent that only sellers and distributors who were "consciously and deliberately engaged in the marketing of child pornography" would be subject to prosecution. The age of the performer is so crucial to the regulatory scheme that Congress could not have intended to proscribe "knowing" engagement in child pornography absent proof that a defendant knew the questioned materials contained depictions of minors.

Any other construction would wreak havoc on the businesses of distributors and sellers of mainstream materials on which consumers rely. It would create a chilling effect on the distribution of First Amendment-protected visual works, and would put mainstream distributors and retailers at risk of arrest without culpability. Mainstream distributors and retailers require some measure of certainty that they are not inadvertently operating in violation of the Act. Lower levels of scienter, including the recklessness standard proposed by the dissent below, fail to provide that certainty and inject variability by permitting, even requiring, distributors, retailers and librarians to inquire into the possibility that subjects depicted in visual materials they handled were minors engaged in sexual conduct. Given the difficulty of approximating any individual's age, a statute imposing criminal liability based on age must be narrowly drawn. The recklessness standard, itself subject to varying constructions and interpretations and involving subjective assessments of risk, is particularly ill-suited in this context, where the stakes are so high and a distributor, retailer or librarian could easily be penalized for having guessed wrong.

A distributor's, bookseller's or librarian's only alternative in attempting to comply with anything other than an actual knowledge standard would be to invest massive resources that nonetheless might not effectively insulate it from prosecution. Even if distributors, retailers or librarians could apply such resources, and even if it were possible to ascertain with some certainty whether they should have known a particular work portrayed a minor, such a standard would necessarily limit the scope of materials distributed by members of *amici* in their attempts to avoid unwitting criminal sanction.

ARGUMENT

I. ESTABLISHED PRECEDENT REQUIRES ACTUAL KNOWLEDGE OF A MINOR'S UNLAWFUL DEPICTION TO SUPPORT A CONVICTION UNDER § 2252.

A. Requiring Knowledge of the Subject's Age is Consistent with the Court's Prior Holdings.

This case marks the Court's first consideration of the *mens rea* required to prosecute distributors, booksellers or librarians under the federal statute proscribing child pornography. A construction that applies the "knowledge" requirement to each element of § 2252 is consistent with the Court's prior rulings in analogous contexts.

The Court first examined the scienter element of prosecutions for distribution of constitutionally unprotected sexually explicit material in *Smith v. California*, 361 U.S. 147 (1959). There, the Court considered the constitutionality of a municipal ordinance criminalizing booksellers' possession of obscene materials. The ordinance included no element of scienter. The Court recognized the need to prove knowledge of the nature of the materials, concluding that

> [b]y dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. ***For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction***

> ***upon the distribution of constitutionally protected as well as obscene literature.***

Id. at 153 (emphasis added) (footnotes omitted).

As the Court explicitly recognized in *New York v. Ferber*, 458 U.S. 747 (1982), the concern expressed in *Smith* for safeguarding free expression and the distribution of written materials applies to child pornography as well as obscenity cases. *See id.* at 765 ("As with obscenity laws, criminal responsibility [for child pornography] may not be imposed without some element of scienter on the part of the defendant."). Congress recognized and addressed in other parts of the Act the special harm to children associated with child pornography. For example, in contrast with the obscenity standard set forth in *Miller v. California*, 413 U.S. 15 (1973), the Act contains no inquiry into the serious literary, artistic, political or scientific value of a work, it permits prosecution of producers absent proof of scienter, and sets forth particular statutory criteria for prosecution. There is no evidence that Congress intended to lower the *mens rea* element to remedy the concerns already addressed in other portions of the Act.

Moreover, as Justice Brennan highlighted so well in *Smith*, imposing anything other than a "knowledge" standard would cause distributors to self-censor their speech more rigorously. Courts long have recognized the particular danger resulting from laws that create such a pressure. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 59 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963).

Nor does the Court's opinion in *Osborne* compel anything other than a "knowledge" standard. There, the Court considered the constitutionality of a conviction for possession under the Ohio child pornography statute. The conviction was challenged on a variety of grounds, including whether a jury conviction based on strict liability violated due process or

whether it could stand under the "harmless error" rule. The issue of whether "recklessness" was a constitutionally-appropriate standard was not argued by the parties and was not before the Court. The Ohio Supreme Court upheld the statute's validity because it imported a recklessness scienter standard based on Ohio's "gapfiller" statute. *State v. Young*, 525 N.E.2d 1363, 1368 (Ohio 1988). While claiming to apply the statutory "recklessness" definition,[1] the Ohio Supreme Court expanded the definition of recklessness to have many of the aspects of actual knowledge:

> Implicit in this requirement is the necessity of proving that the defendant had some notice of the character of the material possessed. Our reading of the statute as a whole clearly indicates that only those who are on notice as to the illicit character of the material are subject to criminal penalties.

Id. at 1369. The salient policy underlying the regulation of child pornography is to prevent the harm to children associated with materials deemed to be child pornography. *See Ferber*, 458 U.S. at 756-760. By proscribing only "knowing" receipt, distribution or reproduction, the Court can further prosecutions of those who traffic in child pornography, while safeguarding protected visual materials and the businesses and libraries that distribute, sell and circulate them.

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[1] The Ohio statutory definition of recklessness was:

"A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." Ohio Rev. Code 2901.22(C).

"Actual knowledge" does not require a defendant to know the precise age of the person depicted, or even to know as an independent fact that the person is a minor. Obviously, proof that the defendant actually had seen a sexually-explicit photograph of a nude pre-pubescent female or actually had seen a caption that identified the subjects in a sexually-explicit photograph as being 15 years of age would suffice. The test could be stated as whether defendant had such actual knowledge as would put a distributor on actual notice that it was dealing with child pornography.[2]

B. Both the Statutory Language And Congress' Clear Intent Also Support the Position that 18 U.S.C. § 2252 Requires Knowledge that Visual Materials Contained Depictions of Minors.

It is well-established that "[i]n determining the scope of a statute, we look first to its language." *Moskal v. United States*, 498 U.S. 103, 111 S. Ct. 461, 465 (1990). *Accord Pennsylvania Dep't of Pub. Welfare*, 495 U.S. 552, 110 S. Ct. 2126, 2130 (1990); *Mallard v. United States Dist. Court*, 490 U.S. 296, 300-01 (1989). Section 2252 proscribes "knowingly" receiving, distributing or reproducing materials satisfying the definition of child pornography. The statutory language itself thus identifies "knowledge," rather than any other scienter standard, as the requisite *mens rea* for prosecution under § 2252.

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[2] Nor can a child pornographer shield himself from liability by wilfully blinding himself to facts showing that he was dealing with child pornography. *See, e.g., United States v. Picciandra*, 788 F.2d 39, 46-47 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986). In a child pornography case, facts evidencing conscious avoidance of facts indicating a defendant dealt with child pornography could support conviction; however, sexual explicitness alone would not be a sufficient trigger for criminal liability.

Read in text, it seems evident that "knowingly" should apply to each of the elements in the sentence. Given the fact that scienter is constitutionally required, one can presume that Congress intended the culpability standard it inserted early in each clause in § 2252 to apply wherever a culpability standard is required in that section, rather than some other, unstated, standard.

This position is supported by the legislative history. During the floor debate on the bill, Senator Percy stated that he assumed that the term "knowingly" in the proposed amendment meant that "the distributor or seller must have either, first, actual knowledge that the materials do contain child pornography depictions or, second, circumstances must be such that he should have had such actual knowledge, and that mere inadvertence or negligence would not alone be enough to render his actions unlawful." 123 Cong. Rec. 33,050 (1977). Senator Roth replied:

> That is absolutely correct. This amendment, limited as it is by the phrase "knowingly," insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography and thereby are actively contributing to the maintenance of this form of child abuse are subject to prosecution under this amendment.

Id.

Senator Percy then asked whether a bookseller could be prosecuted under § 2252 "if a book or magazine which happened to contain prohibited material is discovered in his shop." *Id.* Senator Roth responded that Section 2252 "creates no affirmative duty to inspect on the part of the distributor or seller, though it would certainly apply to one who actively and affirmatively endeavors to conceal his knowledge." *Id.* This exchange

between Senators Percy and Roth clearly shows that the word "knowingly" was meant to require knowledge on the defendant's part that he was trafficking in child pornography.

Congress deliberately omitted the use of the word "knowingly" in 28 U.S.C. § 2251, which proscribes the production of child pornography and which also was enacted as part of the Act. The Conference Committee report points out that the word was omitted from Section 2251 "with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child." S. Rep. No. 601, 95th Cong., 1st Sess. 5 (1977); H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. (1977). It follows that, in retaining the word "knowingly" in § 2252, Congress must have intended to include knowledge requirement.

C. Virtually All Courts Considering the Issue Have Concurred that the Act Requires Knowledge that Minors were Depicted.

Numerous courts have considered the very question presented here. Nearly without exception, those courts have concluded that the knowledge standard pronounced in § 2252 applies to the age of the subject as well as to the other statutory elements the statute requires. *See, e.g., United States v. Cochran*, No. 93-1578, 1994 U.S. App. LEXIS 2455, at * 12 (3d Cir. Feb. 2, 1994); *United States v. Edwards*, No. 92 Cr 884, 1993 WL 453461 at 5 (N.D. Ill. Nov. 4, 1993); *United States v. Prytz*, 822 F. Supp. 311, 320-21 (D.S.C. 1993); *United States v. Long*, 831 F. Supp. 582, 586 (W.D. Ky. 1993); *United States v. Maday*, CR-88-145E, 1989 WL 53023 at 3 (W.D.N.Y. May 18, 1989); *United States v. Sherin*, No. 86 Cr. 481, 1987 U.S. Dist.

LEXIS 458, at * 25 (S.D.N.Y. Jan. 28, 1987);[3] *see also United States v. Gifford*, No. 93-1645, 1994 U.S. App. LEXIS 3175, at * 31 (1st Cir. Feb. 24, 1994); *United States v. Duncan*, 896 F.2d 271, 278 (7th Cir. 1990).[4] Only one court stands with the dissent below in permitting prosecutions based on recklessness as to the performer's age, and that court merely adopted the dissenting opinion with little additional discussion. *See United States v. Kempton*, 826 F. Supp. 386, 388-89 (D. Kan. 1993).

The dissenting opinion below thus comprises the sole judicial discourse advocating a "recklessness" standard. Yet even that opinion notes that "[w]hich mental state to choose is not entirely clear." *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1296 n.8 (9th Cir. 1992) (Kozinski, J., dissenting). The dissent selected the recklessness standard based on two factors which are not convincing: (1) the policy favoring the prosecution of those who traffic in child pornography, which would not be hampered by the "knowledge" standard; and (2) the Court's decision in *Osborne v. Ohio*, which, as discussed

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[3] Only two district court judges have stated that proof of knowledge of minority is not required. *See United States v. Kleiner*, 663 F. Supp. 43, 44-45 (S.D. Fla. 1987) (§ 2252 does not require proof of knowledge of victim's age); *United States v. Tolczeki*, 614 F. Supp. 1424, 1425-29 (N.D. Ohio 1985) (§ 2252 establishes *per se* rule).

[4] While some cases expressly require proof of the performer's minority, *see, e.g., United States v. Cochran*, No. 93-1578, 1994 U.S. App. LEXIS 2455 (3d Cir. Feb. 2, 1994); *United States v. Long*, 831 F. Supp. 582, 586 (W.D. Ky. 1993); *United States v. Sherin*, No. 86 Cr. 481, 1987 U.S. Dist. LEXIS 458 (S.D.N.Y. Jan. 28, 1987), others require that proof only implicitly, by requiring proof of the "nature and contents" of the materials, which should, by definition, require knowledge that minors are depicted. *See e.g., United States v. Edwards*, No. 92 Cr. 884, 1993 WL 453461 (N.D. Ill. Nov. 4, 1993); *United States v. Prytz*, 822 F. Supp. 311, 321 (D.S.C. 1993); *see also, United States v. Brown*, 862 F.2d 1033, 1037 (3d Cir. 1988) (§ 2252 requires specific knowledge as to the general category of unlawful items). To avoid unnecessary ambiguity, *amici* recommend that the Court read the statute expressly to require proof of the performer's minority.

above, does not clearly support that standard. By contrast, the "knowledge" standard comports with the overwhelming number of courts considering the issue, is consistent with the statutory language and legislative history, and is not contradicted by any binding or compelling reasoning.

II. ANY LESSER STANDARD WOULD IMPOSE UNWORKABLE RESTRICTIONS ON DISTRIBUTORS, RETAILERS AND LIBRARIANS, AND WOULD UNCONSTITUTIONALLY CHILL PROTECTED SPEECH.

A. The Recklessness Standard is Vague and Difficult to Apply.

Were the Court to adopt a "recklessness" standard, it would invite numerous and severe interpretive problems. The recklessness standard is both subject to divergent interpretations and itself involves subjective judgment that would pose problems for mainstream distributors, retailers and librarians such as *amici*.

The Model Penal Code defines the recklessness standard as follows:

> A person acts recklessly with respect to a material element of an offense when he ***consciously disregards a substantial and unjustifiable risk*** that the material element exists or will result from his conduct. The risk must be of such nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

ALI Model Penal Code Act, § 2.02(c) (1980) (emphasis added). Although many states follow the Model Penal Code approach, some of the modern codes employ different definitions. 1 Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal Law*, § 3.7, at 333 n.26 (1986). Nor have courts applied the term consistently. *Id.* at 326. Recklessness has been defined to include both "(a) conduct creating a higher degree of risk than is necessary for ordinary negligence and (b) a subjective awareness that the conduct creates such a risk;" however, sometimes "it is used simply to distinguish the requirement of subjective fault," and "sometimes it is defined to cover the inadvertent creation of a high degree of risk." *Id.* at 326 n.5. The manner in which the Ohio Supreme Court redefined recklessness in *Osborne* demonstrates this unwanted variability.[5] *See* pp. 9-10, *supra*. The uncertainty of the definition, as well as the subjective judgment it often involves, would create grave problems for the mainstream *amici* before this Court, who would not know what steps are required for compliance and whether they can practically be effectuated, forcing them to shy away from the distribution of constitutionally-protected materials.

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[5] Thus *amici* strenuously disagree with the statement by the United States that "it is not likely to make a difference in many cases whether the Court adopts a `knowledge' standard or a `recklessness' standard. . ." Petition for Cert., p. 11, n.4.

B. Any Standard Less Stringent than Actual Knowledge would have an Impermissible Chilling Effect on Distributors, Retailers and Librarians, who would be Forced to Unduly Restrict the Materials Available to the Reading and Viewing Public.

If the Court were to impose a standard of recklessness or some other diminished standard, wholesalers, distributors, retailers and librarians would face the impossible burden of combing through the vast quantity of material that nominally passes through their hands daily. A standard forcing those in the stream of commerce of visual communicative materials to examine every item from cover to cover or to proceed at their peril would constitute an overwhelming impediment on the distribution of First Amendment-protected materials by mainstream businesspeople.

A few facts highlight the problem. "Approximately 500,000 books are in print at any given time, and 50,000 new books are published every year." *American Booksellers' Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986), *rev'd on other grounds*, 919 F.2d 1493 (11th Cir. 1990). Approximately 3,500 periodical titles are published each year. A typical periodical distributor maintains an inventory of over 2000 different periodical titles, which appear weekly, bi-weekly, monthly or quarterly. Shipments are made to retailers no less than weekly. Retailers include grocery stores, convenience stores, drug stores and other establishments. Librarians similarly manage substantial volume of works daily. Over 200 public libraries sampled by the U.S. Department of Education in the fall of 1982 had collections of 300,000 works or more. Twelve percent, or over 1000, had collections of over 100,000 works.

In most cases, the distribution intermediaries do not look at the materials, but rather, allocate and deliver them. In many cases they do not even open individual boxes. Similar problems arise at the retail level. Many items arrive and are sold packaged; others of the thousands that are carried by a bookseller or other retailer are not individually reviewed. Librarians would be required to review the perceived ages of subjects depicted in any book, magazine or videotape they circulate.[6]

Nor can the practical impact be mitigated by selective review in "obvious" categories. Nude, semi-nude and suggestive clothing advertisements appear in all sorts of periodicals including the New Yorker, Mademoiselle, Glamour, Cosmopolitan, Self, Shape, or the New York Times Magazine; nudity may appear in general circulation periodicals such as Time, Newsweek, Vanity Fair, Vogue or Sports Illustrated, as well as Playboy or Penthouse; it is difficult to anticipate which videotapes are likely to contain images of minors in sexual conduct; and books of all sorts may include photo illustrations which, if of minors, could be considered by some to be child pornography.

An actual knowledge standard affords mainstream businesses and libraries involved in the distribution, sale and circulation of visual materials the ability to distribute legitimate materials free from concern for prosecution, absent a conscious decision to handle, or knowledge of handling, proscribed materials. Even Judge Kozinski, author of the dissenting opinion below, has recognized the dangers associated with establishing the scienter requirement for distributors:

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[6] As stated earlier, *amici* are not suggesting that knowingly blinding oneself to obvious facts constitutes exculpation. See n.2 *supra*.

> it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of actors with whom they have had no direct contact. . . .

United States v. United States Dist. Court, 858 F.2d 534, 543 n.6 (9th Cir. 1988).

CONCLUSION

In order to properly balance the competing considerations of freedom of expression and protection of children, *amici* respectfully request this Court to draw the standard for prosecution under 18 U.S.C. § 2252 narrowly to avoid unnecessary ambiguity. Accordingly, *amici* respectfully request the Court to require proof of actual knowledge of the subject's minority and to remand the case for further proceedings consistent with that determination.

April 14, 1994

MICHAEL A. BAMBERGER
Sonnenschein Nath & Rosenthal
1221 Avenue of the Americas
24th Floor
New York, New York 10020-1089
(212) 768-6700

Counsel of Record for Amici Curiae

Of Counsel:
Margaret S. Determan
Julie Goldscheid

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No. 93-723

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

X-CITEMENT VIDEO INC.,
AND RUBIN GOTTESMAN,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER UNITED STATES OF AMERICA

LEN L. MUNSIL
Counsel of Record
Amicus Curiae

5353 N. 16th Street
Suite 400
Phoenix, Arizona 85016
(602) 265-1513

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

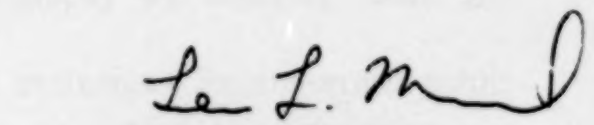
Amicus respectfully moves this Court for leave to file a brief amicus curiae in support of the petitioner, United States. The petitioner has consented in writing to our filing this brief (see Appendix A), but counsel for respondent did not respond to our request for consent.

Amicus has a long-standing interest in and commitment to the governmental effort to eliminate child pornography, and has specific expertise in this area of law (see Interest of the Amicus Curiae, *supra*). NFLF has supporters in all 50 states who are concerned about the effort to protect our children from sexual exploitation. Further, we believe our legal interpretation

of the statute at issue is not represented by either party, or by any other amicus, and will therefore provide a unique perspective to this Court.

For all these reasons, amicus requests that this Court grant our motion for leave to file a brief amicus curiae.

Respectfully submitted,



LEN L. MUNSIL
5353 N. 16th Street
Suite 400
Phoenix, Arizona 85016
(602) 265-1513

INTEREST OF THE AMICUS CURIAE

National Family Legal Foundation (NFLF) is a nonprofit, public interest corporation that seeks to preserve the integrity of families and the innocence of children by promoting a healthy and safe environment, free from illegal pornography and the sexual crimes which invariably accompany its widespread distribution. NFLF provides free legal assistance to prosecutors enforcing child pornography and obscenity laws, and helps draft laws and ordinances for concerned public officials to help lessen the negative influence of pornography on society.

NFLF has appeared as amicus curiae before this Court in every child pornography and obscenity case since NFLF's inception in 1990, including the recent child pornography case of *United States v. Knox*. NFLF

board members Edwin Meese, former Attorney General of the United States, and Alan Sears, former executive director of the Attorney General's Commission on Pornography, have a longstanding commitment to aggressive enforcement of federal child pornography laws.

SUMMARY OF ARGUMENT

Protecting children from sexual exploitation is a governmental interest of surpassing importance. The statute at issue, 18 U.S.C. § 2252, has been employed successfully by federal prosecutors for more than 15 years to prosecute those who traffic in child pornography. The statute has withstood numerous court challenges. But if the Ninth Circuit's decision is correct, § 2252 has suffered all this time from a fatal constitutional defect that no other court was able to discover. We believe strongly that the court of appeals failed to accord Congress the deference it is due by refusing to construe this vital statute in a constitutional manner. The decision of the court of appeals conflicts with decisions of this Court and other federal courts, and most importantly, will cripple the important federal effort

to eliminate child pornography. This Court should therefore reverse the court of appeals and reinstate the convictions of Rubin Gottesman and X-Citement Video.

ARGUMENT

I. The Governmental Interest In Combatting Child Pornography Is Compelling

Federal statutes prohibiting the sexual exploitation of children through the production of pornography -- as distinct from federal prohibitions on the distribution of obscene materials generally -- are of relatively recent origin. They reflect a concern that "[e]ach year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit." H.Rep.No. 536, 98th Cong., 1st Sess., (Nov. 10, 1983), reprinted in 1984 U.S. Code Cong. & Admin. News, 492.

Congress recognized that the distribution and receipt of child pornography contributes to further

incidents of child abuse:

> [M]any pedophiles -- those whose sexual preference is for children -- prefer to purchase [child pornography] through mail order catalogues. This is because often these catalogues permit the pedophile to order materials depicting specific sexual deviations, to establish contact with other pedophiles, and even to establish liaisons with some of the child models.

S.Rep.No. 438, 95th Cong., 2d Sess., at 5 (1977), reprinted in 1978 U.S. Code Cong. and Admin. News, 43.

This Court recognized the substantial governmental interest in protecting children from the evils of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982). In an opinion by Justice White, the Court upheld a New York statute which prohibited the distribution of materials which depict children engaging

in sexually explicit conduct whether or not such depictions are "obscene".

First, the Court found that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" and the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 756-57, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Further, the Court went on to say:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be

> closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 759 (footnote omitted). The Court concluded, because of the compelling state interests involved, that child pornography, even though not obscene, was not protected by the First Amendment.

Finally, in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court approved a law prohibiting the possession of child pornography, even in one's own home. In upholding the statute, this Court further addressed the impact of this vile crime:

> Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain... [E]ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use

child pornography to seduce other children into sexual activity.

The victimization of children through child pornography has been aided by two recent developments, one in technology and one in the law. First, advancements in computer technology and graphics have made it possible for pedophiles to instantaneously reproduce and distribute child pornography on a national and international basis through computer modems. Second, the Justice Department's recent reinterpretation of the definition of child pornography in the case of *United States v. Knox*, No. 92-1183, *cert. granted* 113 S.Ct. 2926 (June 7, 1993), *vacated and remanded*, ___ U.S. ___, 62 U.S.L.W. 3318 (Nov. 1, 1993), has opened the door -- if the courts go along -- to legalization of a whole category of child pornography that was previously

prosecutable. In that case, Congress specifically repudiated the Justice Department's new interpretation by a 100-0 Senate vote, but only after this Court remanded the case to be reconsidered in light of the Justice Department's new, weaker standard.

Given the strength of the government's interest in protecting children from sexual exploitation, and given the traditional reluctance of the judiciary to strike down an act of Congress as unconstitutional on its face, the court of appeals erred by failing to construct § 2252 in a constitutional manner. This crippling of the battle against child pornography can only be corrected if this Court reverses the court of appeals.

II. The Government Must Prove, As With Obscenity Laws, "Some Element Of Scienter," But Not Actual Knowledge Of The Material's Legal Status

In *Ferber*, this Court said that "the States are entitled to greater leeway in the regulation of pornographic depictions of children." 458 U.S. at 756. Nevertheless, the Court ruled that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765.

This comparison to obscenity law regarding scienter stands in contrast to this Court's departure from the obscenity standards in formulating the test for child pornography. Unlike obscenity, this Court held that child pornography need not appeal to the prurient interest, need not be depicted in a patently offensive

way, and need not be considered as a whole in order to be placed outside the protection of the First Amendment. 458 U.S. at 764-65.

But in requiring "some element of scienter," this Court cited to obscenity cases that set outer boundaries on both sides of this issue: on one hand, strict liability is not permissible, *Smith v. California*, 361 U.S. 147 (1959), but on the other hand, knowledge of the legal status of the materials is not statutorily or constitutionally required, *Hamling v. United States*, 418 U.S. 87, 123-24 (1974).

The knowledge this Court has approved in obscenity cases is knowledge of the "character and nature of the materials," *Hamling*, 418 U.S. at 123, and "reason to know" or "a belief or ground for belief which warrants further inspection." *Ginsberg v. New York*, 390 U.S.

629, 643-44 (1968). As this Court indicated in *Ferber*, a similar scienter requirement is appropriate in the child pornography context, yet keeping in mind the "greater leeway" given to the government in regulating child pornography.

This standard is similar to the recklessness standard urged by Judge Kozinsky in his dissent below. *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, at 1292-1297 (9th Cir. 1993). While it is certainly not strict liability, it is much less stringent than the knowledge requirements suggested by the Ninth Circuit and the government. The Ninth Circuit would require "knowledge that at least one of the performers is under age 18," 982 F.2d at 1291, while the government believes that it should have to prove the defendant "knew [the transported material] depicted minors engaging in

sexually explicit acts." United States' Brief in Support of Petition for Writ of Certiorari, at 10-11.

The problem with both of these proposals is that they require the government to prove too much. Both in essence require the government to prove that the defendant knew the legal status of the material. The court of appeals' says that requiring knowledge that at least one performer was underage is only a requirement of knowledge of a particular fact, not a requirement that the defendant know the material's legal status, in violation of *Hamling*. *X-Citement Video*, 982 F.2d at 1291. But this is doublespeak; if you require actual knowledge that one performer is underage, you are requiring actual knowledge of the material's legal status, because by definition it is then child pornography. *Hamling* made clear that knowledge of the material's

legal status was not necessary. 418 U.S. at 123.

How the obscenity scienter standard as outlined in *Hamling* and *Ginsberg*, applied to child pornography cases, would play out under differing factual circumstances would vary according to those facts. We could be assured, however, that "some element of scienter" that was short of actual knowledge of the material's legal status would be required, and constitutional concerns would be met.

While the effect of the court of appeals' decision is to undercut the important federal effort to eliminate child pornography, as a matter of law the ruling conflicts with previous decisions of this Court and other courts. As Judge Kozinsky pointed out in his dissent, the panel ignored this Court's discussion in *Osborne* of the minimum constitutional scienter requirement for a child

pornography conviction. In that case, this Court held that recklessness is constitutionally sufficient to uphold a child pornography conviction. 495 U.S. at 115. Further, courts have an obligation to determine whether constitutionally narrowing an act of Congress will cure its defect before taking the extreme step of invalidating the statute. *Edward D. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *X-Citement Video*, 982 F.2d at 1295, n.6.

The Ninth Circuit decision striking down § 2252 is not simply in the minority -- it stands alone in its conclusions among all the cases interpreting this statute, whether decided before or after *X-Citement Video*. Those decided since *X-Citement Video* have specifically repudiated its reasoning. See e.g. *United States v.*

Burian, 1994 WL 114645 (5th Cir. April 7, 1994) ("We decline to follow X-Citement and choose instead to follow our earlier decisions and those of our sister circuits interpreting the statute to require actual knowledge or reckless disregard of a performer's minority."); *United States v. Cochran*, 1994 WL 25599 (3d Cir. Feb. 2, 1994); *United States v. Gendron*, 1994 WL 50975 (1st Cir. Feb. 28, 1994); *United States v. Gifford*, 1994 WL 46738 (1st Cir. Feb. 24, 1994); *United States v. Colavito*, 1994 WL 76135 (2d Cir. Jan. 24, 1994, amended and reported Mar. 10, 1994). See also these district court cases decided since *X-Citement Video*: *United States v. Long*, 831 F.Supp. 582, 586 (W.D.Ky. 1993); *United States v. Kempton*, 826 F.Supp. 386, 388-89 (D.Kan. 1993); and *United States v. Prytz*, 822 F.Supp. 311 (D.S.C. 1993).

No other courts, past or present, have struggled so mightily to discover the constitutional defects identified and brought to the forefront by the Ninth Circuit panel decision.

The Ninth Circuit panel should have grafted a constitutional requirement of recklessness onto the statute, thus saving it from facial invalidity. It "demeans the grand conception of the First Amendment", *Miller v. California*, 413 U.S. 15, 34 (1973), to continually use the noble protections for freedom of speech afforded by that historic provision to examine in microscopic fashion the validity of convictions for those engaged in "the sordid business of pandering." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 258 (1990) (Justice Scalia, concurring and dissenting), quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966).

Rubin Gottesman not only was involved in "the sordid business of pandering" sexually explicit and probably obscene material, but the government clearly proved in this case that he had actual knowledge that he was distributing child pornography. United States' Brief in Support of Petition for Writ of Certiorari, at 2-4. But it should be enough to sustain a conviction in this case, and in any subsequent child pornography case, for the government to prove that a defendant recklessly trafficked in child pornography. Any further scienter requirement would decriminalize much child pornography, because every trader in pedophilic material involving postpubescent children would successfully argue that he had no idea how old the "performers" were. This would be a crushing blow to our nation's effort to protect children from sexual exploitation.

CONCLUSION

The bottom line is this: Rubin Gottesman makes his living skirting obscenity laws, and like most pornographers was only too happy to satisfy a request for child pornography when the price was right. To people who make their living through commercial exploitation of the flesh of young girls, whether those girls are 11 and 12 as they were in the *Knox* case, or 15 as in this case, or 18 and 19 as they are in most obscenity cases, doesn't make a whole lot of difference. And if they are reckless about the age of those they abuse and degrade to make a profit, we shouldn't go out of our way to construct legal arguments to let them off the hook. But that is what the Ninth Circuit did in the case. It went so far out of the way that not one other court looking at the same statute ever discovered the same constitutional

problem.

Affirming the constitutional validity of convictions for hard-core pornographers who recklessly disseminate sexual material involving children will never interfere with the legitimate free speech rights of the American people. Nor will imposing minimal scienter requirements on those who would order, receive or possess hard-core pornography because they suspect it includes sexual depictions of children. But while federal judges and the Solicitor General's office play fun and challenging intellectual law school games with statutory and constitutional interpretation, in this case and in *Knox*, the sexual abuse of real children for profit continues. This Court should not allow another roadblock to be thrown up in the effort to prosecute despicable criminals who make their living from the sexual abuse of children.

For all the foregoing reasons, it is vital that this Court reverse the Ninth Circuit and reinstate the convictions of Rubin Gottesman and his corporation, X-Citement Video.

Respectfully submitted,

LEN L. MUNSIL
5353 N. 16th Street
Suite 400
Phoenix, Arizona 85016
(602) 265-1513

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amicus Curiae National Family Legal Foundation In Support Of The Petitioner United States" have been sent by U.S. Mail, Postage Prepaid, on this 14th day of April, 1994 to:

Drew S. Days III, Solicitor General
William C. Bryson, Deputy Solicitor General
U.S. Department of Justice
Office of the Solicitor General
10th & Constitution Avenue, NW
Washington, D.C. 20530

Stanley Fleishman
Fleishman, Fisher & Moest
2049 Century Park East
Suite 3160
Los Angeles, California 90067

Rob Showers
National Law Center for Children and Families
3975 University Drive, Suite 320
Fairfax, VA 22030

Paul McGeady
Morality in Media
475 Riverside Drive, Suite 239
New York, NY 10115

Len L. Munsil

LEN L. MUNSIL

APPENDIX A

Office of the Solicitor General

Washington, D.C. 20530

April 13, 1994

Len L. Munsil, Esq.
Executive Director and General Counsel
National Family Legal Foundation
5353 North 16th Street
Suite 400
Phoenix, Arizona 85016

Re: United States v. X-Citement Video, No. 91-723

Dear Mr. Munsil:

As requested in your letter of April 13, 1994, I hereby consent to the filing of an amicus curiae brief on behalf of the National Family Legal Foundation in the above-captioned case.

Sincerely,

Drew S. Days, III

Drew S. Days, III
Solicitor General

cc: William K. Suter, Esq.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

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(16)

No. 93-723

Supreme Court, U.S.
FILED
JUN - 8 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA

Petitioner,

v.

X-CITEMENT VIDEO, INC., & RUBIN GOTTESMAN

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE LAW AND LINGUISTICS CONSORTIUM IN SUPPORT OF RESPONDENTS

Clark D. Cunningham
Washington University
School of Law
Campus Box 1120
One Brookings Drive
St. Louis, MO 63130-4899
(314) 935-6413
Counsel of Record for *Amicus Curiae*

June 8, 1994

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INTEREST OF AMICUS CURIAE

The Law and Linguistics Consortium is a recently formed association of lawyers and linguists interested in applications of linguistics to legal problems. Its founding members are: Clark D. Cunningham, Professor of Law, Washington University; Georgia M. Green, Professor of Linguistics, University of Illinois (Urbana-Champaign); Jeffrey P. Kaplan, Associate Professor of Linguistics, San Diego State University; Judith N. Levi, Associate Professor of Linguistics, Northwestern University; and Lawrence M. Solan, Partner, Orans, Elsen and Lupert, New York City.[1] One goal of the Consortium is to make available to courts faced with questions of statutory interpretation information about how a statutory provision would be understood as a matter of ordinary language. All five current members of the Consortium actively participated in preparing the linguistic analysis presented in this brief.

The Consortium members have no relationship with any party or counsel in this case, no personal interest in the outcome of the case, and no particular position on the issue of child pornography. This brief is filed in support of Respondent only because the Consortium's analysis of the statutory provision is consistent with the analysis of the court below, which ruled in Respondent's favor. [2]

[1] The Consortium has its origins in Solan's publication of The Language of Judges (1993) in which Solan combined his academic training in linguistics and his experience as a lawyer to discuss a wide range of cases in which judges appear to be engaged in linguistic analysis. In the course of reviewing Solan's book for the Yale Law Journal, Cunningham, Levi, Green and Kaplan analyzed three cases from the 1993-94 Supreme Court term while the cases were still pending, and provided the Court and counsel with galley proofs prior to oral argument. See "Plain Meaning and Hard Cases," 101 Yale L. J. 1561, 1562 n. 2 (1994). The article's analysis was cited by the majority opinion in United States v. Granderson, 411 U.S. ___,____, 114 S.Ct. 1259, 1267 n. 7 (1994) and by the concurring opinion in United States v Staples, 411 U.S.___,___, 62 USLW 4379, 4386 (1994)(Ginsburg, J. concurring with O'Connor,J.).

SUMMARY OF ARGUMENT

The court of appeals correctly interpreted the language of 18 U.S.C. 2252 according to principles of standard English when it held that this statutory provision does not require that the defendant know that the materials in question depict minors engaging in sexually explicit acts. The statutory language is not ambiguous as to this issue.

ARGUMENT

The linguistic issue presented in this case is whether, in 18 U.S.C. 2252(a), the adverb *knowingly* can be understood to modify the *if*-clauses that follow it.

18 U.S.C. 2252(a) can be edited to reveal its structure as follows:

(1) (a) Any person who--

(1) knowingly transports...any visual depiction, if--
(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
and
(B) such visual depiction is of such conduct;

or

(2) knowingly receives...any visual depiction

[2] The parties have consented to the filing of this brief *amicus curiae* and letters memorializing their consent are being filed with the Clerk of the Court concurrently with the filing of the brief.

or

> knowingly reproduces any visual depiction..., if--
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> and
> (B) such visual depiction is of such conduct;

shall be punished...

To facilitate discussion of this very complex sentence, we will compress its content into a shorter version in the following way.

- Let "TRANSPORT" stand for any of the relevant verbs in the statutory sentence: *transports*, *ships*, *receives*, *distributes*, *reproduces*.
- Let X stand for *a visual depiction*
- Let Y stand for *the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct*.

Using these abbreviations, the statutory sentence can be further abbreviated to the following:

(2) Any person who knowingly TRANSPORTs X, if producing X involves Y, shall be punished.

The linguistic issue is whether the statutory sentence can legitimately be interpreted as having the meaning expressed in (3):

(3) Any person who knowingly TRANSPORTs X, and knows that producing X involves Y, shall be punished.

Put another way, the question is whether in (2) the *if*-clause is part of what is modified by *knowingly*, or outside of what is modified by *knowingly*.[3] Thus, in (4), *knowingly* combines with the verb phrase *transported a videotape* to form the verb phrase *knowingly transported a videotape*, in which *knowingly* modifies the interior verb phrase *transported a videotape*.

(4) [S [NP Jones] [VP [ADV knowingly] [VP transported a videotape]]][4]

Following the decision of the Ninth Circuit in this case, a number of other circuits have disagreed with its reading of the textual language, asserting either that the provision is ambiguous as to whether *knowingly* modifies the if-clause or even that *knowingly* clearly modifies the if-clause. See United States v. Cochran, 17 F.3d 56 (3rd Cir. 1994), United States v Gendron, 18 F.3d 955 (lst Cir. 1994); United States v. Colavito, 19 F.3d 69 (2d Cir. 1994).

The appellate opinion most directly opposed to the decision below is that of the Third Circuit in Cochran, which concluded that the textual language of "Section 2252 mandates knowledge of the nature and contents of the proscribed materials" 17 F.3d at 60 (emphasis added). Significantly, in reaching this conclusion, the Cochran court rewrote Section 2252, not only omitting the key word "if" but also changing "involves the use of a minor" to "involving

---

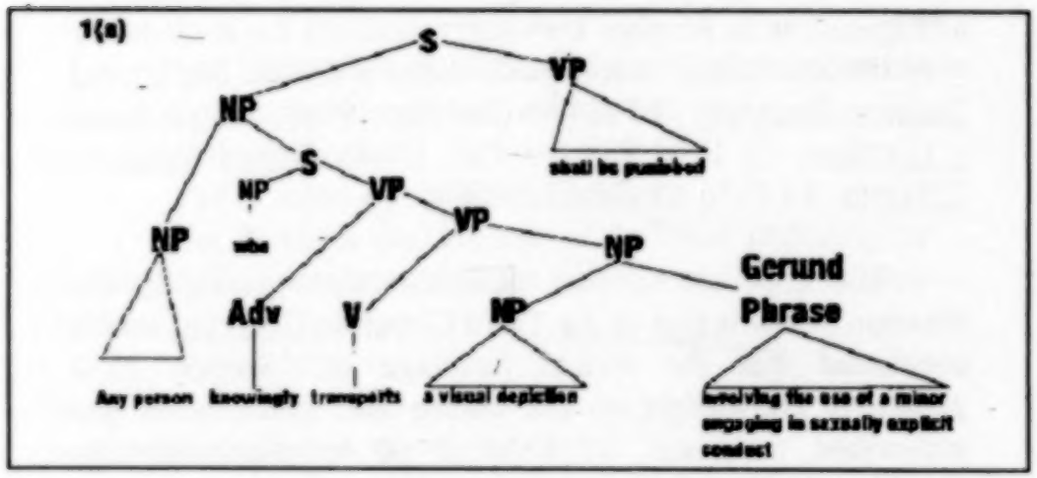
[3] Modifiers are syntactic elements which combine with elements of a certain type to form elements of that same type. See, McCawley *Everything that linguists have always wanted to know about logic*, 2nd ed. (1993) at 17.

[4] In this and other diagrams, we use standard linguistic notation to indicate syntactic categories, as follows: S=sentence, NP=noun phrase, VP=verb phrase, ADV=adverb.

the use of a minor."[5] The Cochran court rewrote the statute to read as follows:

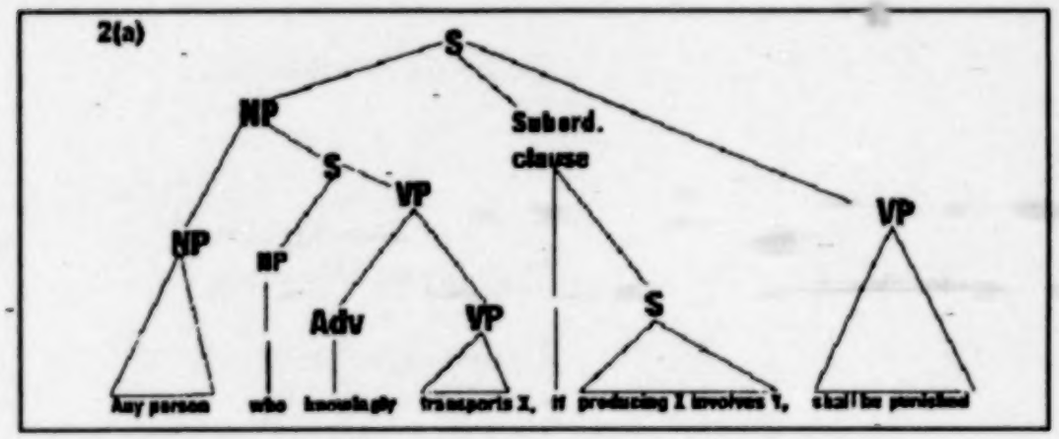
(5) Any one who knowingly transports a depiction involving the use of a minor engaging in sexually explicit conduct shall be punished.

The expression *involving the use of a minor engaging in sexually explicit conduct* is an example of a gerund phrase. Unlike the *if*-clause, this phrase is part of the verb phrase that includes *knowingly*, as shown by the following diagram.



[5] "Similarly, § 2252(a)(2) provides that "any person who knowingly receives...any visual depiction...involv[ing] the use of a minor engaging in sexually explicit conduct" shall be criminally liable." 17 F.3d at 59.

In contrast to the "involving use of minor" gerund phrase, the *if*-clause in the actual statute is not part of the verb phrase modified by *knowingly* , as shown by the following diagram that corresponds to sentence (2) above.



The parenthetical *if*-clause is outside of what *knowingly* modifies. Consequently, the syntactic structure of the sentence does not allow it to be interpreted as if *knowingly* modified *producing X involves Y*.

CONCLUSION

The sentence in the statute requires knowledge of the act of transportation and arguably knowledge that the object transported is a depiction. However, as a matter of standard English, the statute as written simply can not be interpreted as if it meant

> Any person who knowingly TRANSPORTs X, and knows that producing X involves Y, shall be punished.

The fact that some courts seem to have so read the sentence can be attributed to the confusion caused by the peculiar placement of the *if*-clauses and the overall unwieldy length of Section 2252(a).

Respectfully submitted,

Clark D. Cunningham
Washington University
School of Law
Campus Box 1120
One Brookings Drive
St. Louis, MO 63130-4899
(314) 935-6413
Counsel of Record
for the Law & Linguistics
Consortium, *Amicus Curiae*

June 8, 1994